COMMENTARIES

ON THE

LAW OF AGENCY.

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AS A BRANCH OF

COMMERCIAL AND MARITIME JURISPRUDENCE,

WITH OCCASIONAL ILLUSTRATIONS FROM

THE CIVIL AND FOREIGN LAW.

By JOSEPH STORY, LL.D.

NINTH EDITION, REVISED, WITH ADDITIONS.

BY

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ADVERTISEMENT

TO THE NINTH EDITION.

In this edition more than fourteen hundred additional cases are cited, most of them having been reported since the publication of the last edition. The text has been restored to that of the last edition published by Judge Story himself, but all interpolations therein and all the sections added by subsequent editors have been preserved in the notes to this edition. Judge Story's notes have also been restored to the condition in which they were left by him, except that many of the references to obsolete text-books on Agency have been omitted as unnecessary. Some of the notes compiled by the last editor have been retained in their entirety, and are distinguished by the initial G; and the notes of earlier editors, which have been similarly retained, are marked R. The notes compiled by the present editor are marked Ed.; and all the additions to the notes of the author are enclosed in brackets. The index has also been made much more full, and has been extended to the matter contained in the notes. In the arrangement of the notes themselves the editor has deemed it advisable, in consequence of the very full discussion in the text of all the questions which arise bearing upon the subject of Agency, to present the results of the judicial investigations of these questions in as compact a form as possible, so that the student can ascertain at once whether the conclusions reached by the learned author have been sustained or disapproved by the courts.

TO THE HONORABLE

JOHN DAVIS, LL.D.

DISTRICT JUDGE OF THE MASSACHUSETTS DISTRICT.

SIR,

IN dedicating this work to you, I perform one of the most pleasant duties of my life, — the duty of paying a public homage to your character, and of inscribing on these pages a memorial of our long and uninterrupted friendship. Nearly twenty-eight years have elapsed, since, upon my advancement to the Bench of the Supreme Court, I had the satisfaction of meeting you as my colleague in the Circuit Court. During the intermediate period, we have passed through many trying scenes of peace and war, of excited controversies between the great political parties of our country, of seasons of severe prohibitions and pressures upon the commercial and other interests of the community, and of changes of public policy, carrying in their train penalties and forfeitures, which made even the ordinary administration of justice assume a stern and almost a vindictive aspect. The patience, the candor, the urbanity, the sound discretion, and the eminent ability with which you performed all your judicial functions during this period, are known to no one better than to myself; for I have been the constant witness of them, and have sometimes partaken of them, and have always been instructed by them. In the earlier part of your judicial career, you led the way in exploring the then almost untrodden paths of Admiralty and Maritime Jurisprudence, and laid the profession under lasting obligations, by unfolding its various learning and its comprehensive principles. Your judgments have

stood the test of time, and are destined to be laid up among the *Responsa Prudentium* for professional instruction in future ages.

But I confess myself more desirous, on this occasion, to acknowledge with unaffected gratitude my deep sense of your personal friendship and continued kindness. They have lightened many heavy labors; they have cheered many saddened hours; and, above all, they have taught me to feel the value of the truth, that the indulgent approbation of the wise and good is among the most enviable of human blessings. Truly may I say to you, in the language of Lælius, as recorded by Cicero: — Sed tamen recordatione nostræ amicitiæ sic fruor, ut beate vixisse videor, quia cum Scipione vixerim; quocum mihi conjuncta cura de re publica et privata fuit; — et (id, in quo est omnis vis amicitiæ) voluntatum, studiorum, sententiarum, summa consensio.

I am, with the highest respect,

Your obliged friend,

JOSEPH STORY.

CAMBRIDGE, July 18, 1839.

PREFACE.

THE present volume is the commencement of a series of Commentaries, which, in pursuance of the original scheme of the Dane Professorship, it is my design, if my life and health are prolonged, to publish, upon the different branches of commercial and maritime jurisprudence. The task is truly formidable, and full of difficulties; and I approach it with a diffidence proportionate to the public sense of its importance, and to my own consciousness that its perfect execution will require a leisure, and learning, and ability, which are very far beyond my reach. So various are the topics to be discussed, and so numerous the authorities to be consulted, that a whole life might well be spent in collecting and mastering the materials. Even when these should be brought together, the labor of analyzing the principles, and reducing them to a text of a moderate extent, with the practical illustrations necessary to explain and confirm them, might be found sufficient to create some discouragement even in minds accustomed to the close discipline of juridical studies. What I propose to do, therefore, I beg may be treated as an approximation only towards the accomplishment of such a desirable object. My efforts will be to present accurate outlines of the leading doctrines of commercial and maritime law. But it must be left to more gifted minds to enjoy the enviable distinction of having embodied in a durable form the entire details of this vast science.

Although it is my intention to consult the works of foreign jurists and civilians, and to introduce into the text illustrations from the Roman law, and the maritime jurisprudence of Continental Europe, so far as my own imperfect studies will enable me to do so; yet I shall mainly rely upon the elementary treatises and judicial deci-

sions of England and America, as furnishing the most solid and useful expositions of all the doctrines which are to be maintained in these Commentaries. It would betray a narrow subjection to mere prejudice, or a wanton disregard of some of the best sources of instruction, to pass by with neglect the glorious labors of the Roman jurists, or the masterly treatises of such men as Pothier, and Emerigon, and Valin, which have furnished so much to improve and adorn our own law. Sir William Jones has with great felicity said: "What is good sense in one age must be good sense, all circumstances remaining, in another; and pure, unsophisticated reason is the same in Italy and in England, in the mind of a Papinian and of a Blackstone." Still, however, it will scarcely be denied, that the judgments of the Courts of Common Law, upon the great topics of Commercial and Maritime Jurisprudence, since the elevation of Lord Mansfield to the Bench, place them in advance of all others for practical wisdom, profound reasoning, acute discrimination, and comprehensive equity.

In dismissing the present work, and asking for it the indulgent consideration of the Profession, I desire to make a single explanatory remark. As the work is mainly designed for the elementary instruction of students (although, I trust, it may be found useful to lawyers of a more advanced standing), the same train of observations will be found occasionally repeated in different connections. This has been done in order to avoid the embarrassment of perpetual references to other parts of the work, which students could scarcely be presumed to keep constantly before their minds; as well as to furnish them with qualifications, and limitations, and illustrations of principles, which might not otherwise be obvious, or fully appreciated, when presented in a disconnected form. The admonition of our ancient master, Littleton, should never be forgotten, that by the arguments and reasons in the law a man sooner shall come to the certainty and knowledge of the law. "Lex plus laudatur, quando ratione probatur."

CAMBRIDGE, near Boston,
July 18, 1839.

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COMMENTARIES ON AGENCY.

CHAPTER I.

AGENCY IN GENERAL.

§ 1. In conformity with the original plan, prescribed to me by the founder of the Dane Professorship, my design in the present commentaries is to expound the elementary principles belonging to the leading branches of commercial and maritime jurisprudence. And, in the first place, let us proceed to the consideration of the law of agency, a subject intimately connected with all these branches, and in no small degree necessary to a full and exact exposition of the doctrines applicable to them. From this we shall be led, by a very easy and natural transition, to the law of partnership. And these being discussed, the path to others will lie open before us, unobstructed by any collateral inquiries, which may embarrass our progress.

§ 2. It is obvious to remark, that a large proportion of the business of human life must necessarily be carried on by persons, not acting in their own right, or from their own intrinsic authority, over the subject-matter, but acting under an authority derived from others, who, by the principles of natural and civil law, are exclusively invested with the full and complete original dominion, authority, and right over such subject-matter. By the general theory of our municipal jurisprudence, and probably by that of all civilized nations, professing to be governed by a regular system of laws, every person is invested with a general authority to dispose of his own property, to enter into contracts and engagements, and to perform acts, which respect his personal rights, interests, duties, and obligations, except in cases where some positive or known disability is imposed upon him by the laws of the country, in which

he resides, and to which he owes allegiance. Every person not under such a disability, is treated as being *sui juris*, and capable, not only of acting personally in all such matters by his own proper act, but of accomplishing the same object through the instrumentality of others, to whom he may choose to delegate, either generally, or specially, his own authority for such a purpose.[1] In the expanded intercourse of modern society it is easy to perceive, that the exigencies of trade and commerce, the urgent pressure of professional, official, and other pursuits, the temporary existence of personal illness or infirmity, the necessity of transacting business at the same time in various and remote places, and the importance of securing accuracy, skill, ability, and speed in the accomplishment of the great concerns of human life, must require the aid and assistance and labors of many persons, in addition to the immediate superintendence of him, whose rights and interests are to be directly affected by the results.[2] Hence the general maxim of our laws, subject only to a few exceptions above hinted at, is, that whatever a man *sui juris* may do of himself, he may do by another; and as a correlative of the maxim, that what is done by another is to be deemed done by the party himself. "Qui facit per alium, per seipsum facere videtur."[3]

§ 3. In the common language of life, he, who, being competent, and *sui juris*, to do any act for his own benefit, or on his own account, employs another person to do it, is called the principal, constituent, or employer; and he, who is thus employed, is called the agent, attorney, proxy, or delegate of the principal, constituent, or employer.[4] The relation, thus created, between the parties, is termed an agency. The power, thus delegated, is called in law an authority. And the act, when performed, is often designated as an act of agency or procuration; the latter word being derived from the Roman law, in which *procuratio* signifies the same thing as agency, or the administration of the business of another.[5] When

[1] Bac. Abridg. *Authority*, A.

[2] See 1 Domat, B. 1, tit. 15; Introduction to title Proxy, &c. 215, 216. The Digest pithily puts the point. Usus autem procuratoris perquam necessarius est, ut qui rebus suis ipsi superesse vel nolunt, vel non possunt, per alios possint, vel agere, vel conveniri. Dig. Lib. 3, tit. 3, l. 1, § 2.

[3] Co. Litt. 258 a.

[4] See 1 Domat, B. 1, tit. 15, Introd.

[5] Brisson. De Verb. Sign. Procuratio; Code of Louisiana, tit. 15, art. 2954; Civil Code of France, art. 1984, 1985; Malyne, Lex Merc. 79; 1 Bell, Comm. 385 (4th ed.); Id. B. 3, pt. 1, ch. 3, p. 476 (5th ed.).

the agency is created by a formal written instrument, especially if it be under seal, it is with us commonly called a letter of attorney; by foreign writers it is more commonly called a procuration.[1] In the Roman law the agent was called a procurator, and he was thus defined: "procurator est, qui aliena negotia mandatu domini administrat;"[2] so that the *dominus* (master) of the civil law answered exactly to the principal of our law. Indeed, the definition of an agent at the common law seems borrowed from this very source; and Lord Chief Baron Comyns has well expressed it, when he says, that "An attorney is he, who is appointed to do any thing in the place of another."[3]

§ 4. It may not be without use to remark, that in the Roman law an agency was sometimes called, in a large sense, a *mandatum* (mandate); and the principal was denominated *mandator* or *mandans* (the employer or mandant), and the agent *mandatarius* (the employee or mandatary).[4] For, in the primitive sense of the term, *mandatum* was not so much a contract, from which there sprung up a civil obligation and action, as a business or negotiation (*negotium*), which was confided to the discretion of the mandatary; "mandare est gerendum quid alicui committere."[5] But, in the more ordinary sense of the word, *mandatum* was limited to such an agency, as was authorized and undertaken for another gratuitously, and without reward. For, if a compensation was to be received, it fell under another head, and was a *locatio et conductio*, a letting and hiring of the services of the agent; and it was then governed by somewhat different obligations and duties.[6] Hence it is declared:

[1] Co. Litt. 52 a; Malyne, Lex Merc. 78, 79. Thus, for example, Domat defines a procuration in this manner: "La procuration est un acte par lequel celui, qui ne peut vaquer luimême à ses affaires, donne pourvoir à un autre de le faire pour lui, comme s'il etait luimême présent; soit qu'il faille simplement gérer et prendre soin de quelque bien, ou de quelque affaire, ou que ce soit pour traiter avec d'autres." 1 Domat, B. 1, tit. 15, § 1, art. 1.

[2] Dig. Lib. 3, tit. 3, l. 1; Heinecc. ad Pand. Lib. 3, tit. 3, §§ 415, 423; Pothier, Pand. Lib. 3, tit. 3, n. 2.

[3] Com. Dig. *Attorney*, A.

[4] See 1 Stair, Inst. B. 1, tit. 12, p. 127, ed. by Brodie; Ersk. Inst. B. 3, tit. 3, § 31; Story on Bailm. § 138.

[5] Brisson. Verb. Signif. *Mandare;* Noodt. in Pand. tom. 2, p. 372; Heinecc. ad Pand. Lib. 17, tit. 1, § 230, note; 1 Domat, B. 1, tit. 15, Introd.

[6] It is in the broad sense above stated, that the word "mandate" is used in the present Civil Code of France, as well as in the Civil Code of Louisiana. See Civil Code of France, art. 1984, 1986; Civil Code of Louisiana, art. 2954, 2955, 2960. The modern Scottish mercantile law seems to apply the word

"mandatum, nisi gratuitum, nullum est, nam originem ex officio atque amicitiâ trahit. Contrarium ergo est officio merces; interveniente enim pecuniâ res ad locationem et conductionem potius respicit."[1] But this distinction and the consequences thereof have been fully expounded in the commentaries on bailments, to which the learned reader is referred for more exact information.[2] The agency, which will be principally, although not exclusively, treated of in the present work, is that which arises in the course of commercial affairs; and illustrations will be borrowed from other sources, only when they may serve more fully to explain the doctrines applicable to the former.

mandate in the same broad sense. 1 Bell, Comm. 385, § 408 (4th ed.); Id. B. 3, pt. 1, ch. 3, § 3, p. 476 (5th ed.); 1 Domat, B. 1, tit. 15, Introd.

[1] Dig. Lib. 17, tit. 1, l. 1, § 4; 1 Domat, B. 1, tit. 15, § 1, art. 9.

[2] Story on Bailm. §§ 137–156.

CHAPTER II.

WHO ARE CAPABLE OF BECOMING PRINCIPALS AND AGENTS.

§ 5. LET us next proceed to the consideration of the question, who is capable of becoming a principal, and in regard to what matters; and who is capable of becoming an agent, and in regard to what matters. In general, it may be said, that every person *sui juris*, is capable of becoming both a principal and an agent, unless there exists some disability or prohibition by the municipal law, which is to regulate his rights and duties. In order, therefore, to arrive at any accurate understanding of this subject, we are to examine the exceptions created by that municipal law; and where these exceptions cease, the natural presumption is, that in all other cases the general rule prevails.

§ 6. And first, who are principals, capable of delegating authority to others to act in their behalf and for their interest. In general it may be stated (as has been already intimated), as a rule of the common law, that, whenever a person has a power, as owner, or in his own right, to do a thing, he may do it by an agent.[1] Every person, therefore, of full age, and not otherwise disabled, has a complete capacity for this purpose. But infants, married women, idiots, lunatics, and other persons not *sui juris*, are either wholly or partially incapable of appointing an agent. Idiots, lunatics, and other persons not *sui juris*, are wholly incapable;[2] and infants and

[1] Combe's case, 9 Co. R. 75 b; Com. Dig. *Attorney*, C. 1; Heinecc. ad Pand. Pt. 1, Lib. 3, tit. 1, § 424. Ante, § 2.

[2] [Tarbuck *v.* Bispham, 2 M. & W. 2; Stead *v.* Thornton, 3 B. & Ad. 357 note; but Mr. Evans, in his recent work on Principal and Agent, Book I., p. 10 (Am. ed.), says that this cannot be accepted without qualification as the law of England, and quotes the case of Molton *v.* Camroux (2 Ex. 487; s. c. 4 Exc. 17), which decides that when the principal is of unsound mind, and the fact is unknown to the other party, this unsoundness will not vacate the contract, — especially when it has been executed in whole or in part, and no advantage taken of the lunatic; but see Western Cement Co. *v.* Jones, 14 Am. L. Rev. 330; Baxter *v.* Earl of Portsmouth, 5 B. & C. 170; Brown *v.* Goddrell, 3 C. & P. 30; Drew *v.* Nunn, L. R. 4 Q. B. D. 661. And it has been held that the after-occurring insanity of a principal operates *per se* as a revocation or suspension of the powers of his agent, except where a consideration has been

married women are incapable, except under special circumstances.[1] Thus, for example, an infant may authorize another person to do any act which is for his benefit; but he cannot authorize him to do an act which is to his prejudice.[2] If, therefore, an infant should make a letter of attorney to another, to take livery of lands on a feoffment to him, it will be good; for it will be intended to be for his benefit.[3] But if an infant should make a feoffment, and execute a letter of attorney to another, to make livery in his name to the feoffee, it will be void; for such feoffment and livery will be intended to be to his prejudice.[4] So in regard to married women,

previously advanced in the transaction, so that the power becomes coupled with an interest, or where a consideration of value is given by a third party dealing with the agent, relying on his apparent authority in ignorance of the principal's incapacity. Matthiessen Ref. Co. *v.* McMahon, 38 N. J. Law, 536. So where the principal is so drunk as not to know what contract he is making, the other party cannot enforce it. Hamilton *v.* Grainger, 5 H. & N. 40; but such contract is voidable, and not void, and may be ratified when he is sober. Matthews *v.* Baxter, L. R. 8 Ex. 132. — Ed.]

[1] The civil law included the like disabilities. Thus, for example, an idiot or lunatic was rendered incapable of contracting, and could not delegate authority to another to act for him. Furiosus nullum negotium gerere potest, quia non intelligit, quod agit. Inst. Lib. 3, tit. 20, § 8.

The same rule applied to an infant, as contradistinguished from a minor of years of discretion. Nam infans, et qui infantiæ proximus est, non multum a furioso distant; quia hujusmodi ætatis, pupilli nullum habent intellectum. Inst. Lib. 3, tit. 20, § 10. Furiosi vel ejus, cui bonus interdictum sit, nulla voluntas est. Dig. Lib. 50, tit. 17, l. 40; Id. l. 5. But then again a minor or pupil might sometimes act by an agent, with the consent of his guardian or tutor. Verum, si ipse pupillus præposuerit, si quidem tutoris auctoritate, obligabitur; si minus, non. Dig. Lib. 14, tit. 3, l. 9; Inst. Lib. 3, tit. 20, § 9; Pothier, Pand. Lib. 3, tit. 3, n. 17, 18; Pothier on Oblig. n. 49–52; Dig. Lib. 50, tit. 17, l. 5. Heineccius lays down the general rule, and the exceptions in the following brief terms. (1.) Ut ii demum procuratorem constituant, qui et mandare et res suas libere administrare possunt; adeoque, (2.) Non furiosi mente capti, infantes, surdi, muti, prodigi. Heinecc. ad Pand. Pt. 1, Lib. 3, tit. 3, § 424. See Pothier on Oblig. n. 49–52, n. 74, 75.

[2] Keane *v.* Boycott, 2 H. Black. 515; Tucker *v.* Moreland, 10 Peters, 58, 69; Whitney *v.* Dutch, 14 Mass. 463; 2 Kent, Comm. Lect. 31, pp. 233–243 (4th ed.).

[3] Com. Dig. *Enfant*, B. 1; 1 Roll. Abridg. 730, l. 10; Zouch *v.* Parsons, 3 Burr. 1808; Combe's case, 9 Co. R. 76 b; 2 Kent, Comm. Lect. 31, pp. 233–344 (4th ed.).

[4] Com. Dig. *Enfant*, C. 2; Perk. Prof. Bk., Grant, 13; Zouch *v.* Parsons, 3 Burr. 1804; Combe's case, 9 Co. R. 75, 76; Lawrence *v.* McArter, 10 Ohio, 37; Pyle *v.* Cravens, 4 Littell, 18; Doe d. Thomas *v.* Roberts, 16 Mees. & Wels. 778; Bennett *v.* Davis, 6 Cowen, 393; Waples *v.* Hastings, 3 Harrington, 403; Knox *v.* Hack, 10 Harris, 337. See Bingham on Infancy (Bennett's ed.).

ordinarily, they are incapable of appointing an agent or attorney; and even in case of a joint suit at law, an appointment of an attorney by a married woman is void; and her husband may make an attorney for both.[1] But where a married woman is capable of doing an act, or of transferring property or rights with the assent of her husband, there, perhaps, she may, with the assent of her husband, appoint an agent or attorney to do the same.[2] So with regard to her separate property, she may, perhaps, be entitled to dispose of it, or to encumber it, through an agent or attorney; because in relation to such separate property she is generally treated as a feme sole.[3] I say, perhaps; for it may admit of question; and there do not seem to be any satisfactory authorities directly on the point.[4]

[1] Saunderson *v.* Marr, 1 H. Bl. 75; Roberts *v.* Peirson, 2 Wils. 3; Foxwiste *v.* Tremaine, 2 Saund. 212, 213; Bacon Abridg. *Baron & Feme*, I.; Wilkins *v.* Wetherell, 3 Bos. & Pull. 220; Maclean *v.* Douglas, 3 Bos. & Pull. 128; Viner, Abridg. *Attorney*, C. pl. 5, 7; Co. Litt. 42 b, Harg. note 4; Co. Litt. 112 a, Harg. note 6.

[2] *Sed quære.* [See Holladay *v.* Daily, 19 Wall. 607.]

[3] See 2 Story on Equity Jurisp. §§ 1391–1402. [Under the English law a married woman has the right to appoint an agent coextensive with her rights to act as feme sole. Evans on Principal and Agent (Am. ed.), p. 11; Ramsden *v.* Brearley, L. R. 10 Q. B. 147; Lean *v.* Schutz, 2 W. Bl. 1196. And it has been held that a married woman may make contracts for improvement of her real estate through an agent. Vail *v.* Meyer, 71 Ind. 159. She can appoint her husband her agent. McLaren *v.* Hall, 26 Iowa, 297; Jones *v.* Smith, 121 Mass. 15. He may act as her agent to collect rents of real estate, Walker *v.* Carrington, 74 Ill. 446: to negotiate sale of real estate, and she will be bound by his actions in her behalf, Lavassar *v.* Washburne, 50 Wisc. 200: to invest her money in real estate, Ready *v.* Bragg, 1 Head (Tenn.), 511; Coolidge *v.* Smith, 129 Mass. 554: to sell personal property for her, Griffin *v.* Ransdell, 71 Ind. 440: and she will be held liable upon notes given by him as her agent, Freiberg *v.* Branigan, 18 Hun (N. Y.), 344. He can make a settlement for her of a claim for damages against an officer, Paine *v.* Farr, 118 Mass. 74: but the evidence necessary to establish such agency must be positive, Wright *v.* Hood, 49 Wisc. 235. — Ed.]

[4] See Clancy on Husband and Wife, 166–169; Id. ch. 5, pp. 282–294; Roper on Husband and Wife, ch. 16, II. pp. 97–100; Id. 107, 108, 126; Id. ch. 19, pp. 184, 185, 193, 194. It is laid down in Com. Dig. *Baron & Feme*, G. 3, that, if there be a demise for years by husband and wife of the lands of the wife, with a letter of attorney, signed by both, to deliver the lease upon the land, it is a good demise of both during the coverture, though the wife cannot make an attorney. And for this is cited ——— *v.* Hopkins, Cro. Car. 165; and Cooper's case, 2 Leon. 200; which are directly in point. But Gardner *v.* Norman, Cro. Jac. 617; Wilson *v.* Rich, Yelv. 1; S. C. 1 Brownl. 134; Plomer *v.* Hockhead, 2 Brownl. 248, are to the contrary. Adams, in his work on Ejectment (p. 179 [174], third edition), lays down the rule according to these latter cases. See also Runnington on Ejectment, 148.

§ 7. Secondly, who are capable of becoming agents. And here it may be stated, that there are few persons who are excluded from acting as agents, or from exercising an authority delegated to them by others. Therefore, it is by no means necessary for a person to be *sui juris*, or capable of acting in his or her own right, in order to qualify himself or herself to act for others. Thus, for example, monks, infants, femes covert, persons attainted, outlawed, or excommunicated, villeins, and aliens may be agents for others.[1] For the execution of a naked authority can be attended with no manner of prejudice to persons under such incapacities or disabilities, or to any other person, who by law may claim any interest under such incapacitated or disabled persons after their death.[2] Nay, a feme covert may be an attorney of another to make livery to her husband upon a feoffment; and a husband may make such livery to his wife; although they are generally deemed but one person in law.[3] She may also act as the agent or attorney of her own husband, and as such, with his consent, bind him by her contract or other act,[4] or she may act as the agent of another in a contract with her own hus-

[1] Thomson on Bills, p. 220 (2d ed.), 1836; Co. Litt. 52 a; Bac. Abridg. *Authority*, B.; Com. Dig. *Attorney*, C. 4; Id. *Baron & Feme*, P. 3. Aliens are enumerated by Lord Coke (as in the text) as capable of being agents for others. By this Lord Coke probably had in view alien friends, who, although they have not a capacity to hold real estate for themselves, may act as attorneys for others in letting or selling real estate. [Chastain *v.* Bowman, 1 Hill (S. C.), 270.]

[2] Bacon, Abridg. *Authority*, B.

[3] Emerson *v.* Blonden, 1 Esp. 142; Prestwick *v.* Marshall, 7 Bing. 565; Palethorp *v.* Furnish, 2 Esp. 511, note; Hopkins *v.* Mollineux, 4 Wend. 465. [In order to bind her husband as his agent, she must be shown to have authority express or implied. Montague *v.* Benedict, 3 B. & C. 631. In a recent case in Massachusetts the plaintiff asked the defendant to purchase and keep for him a bond, which he did for some time and without pay for his services. He then sent it by mail to plaintiff's wife, but not by her request, and in the plaintiff's absence. It was lost, and defendant was held responsible. It was held that there was no such relation between husband and wife as to make her his agent for such purpose without express authority. Jenkins *v.* Bacon, 111 Mass. 373. It has been held, however, that where a married woman keeps intoxicating liquors for sale in violation of law, and her husband has knowledge of the fact, there is a legal presumption that she is acting under his coercion, and sells as his agent, and he can be convicted, Commonwealth *v.* Pratt, 126 Mass. 462: but he is not liable when she makes such sale in his absence and contrary to his express instructions, State *v.* Baker, 71 Mo. 475. — Ed.]

[4] Bacon, Abridg. *Authority*, B.; Co. Litt. 112, and Harg. note 6; Pothier on Oblig. n. 74, 82; [Pickering *v.* Pickering, 6 N. H. 124; MacKinley *v.* McGregor, 3 Wharton, 369; Felker *v.* Emerson, 16 Verm. 653; Story on Bailments, § 162; Edgerton *v.* Thomas, 5 Seld. 40].

band.[1] There are, indeed, some exceptions to the general rule above stated; for an idiot, lunatic, or other person otherwise non compos mentis, cannot do any act, as an agent or attorney, binding upon the principal; for they have not any legal discretion or understanding to bestow upon the affairs of others, any more than upon their own.[2] And even in case of a feme covert, although in general she is competent to act as an agent of a third person; yet it is by no means clear, that she can do so against the express dissent of her husband, as such agency may involve duties and services inconsistent with those which appertain to her peculiar relations to her husband and family.

§ 8. Distinctions, not unlike these, existed in the civil law; for by that law a minor, a feme covert, a servant, a slave, a kinsman,[3] or an alien, might be appointed as an agent. And especially does this seem to have been applicable to the common course of transactions in the ordinary business of a store or shop, where the person, who superintended it, was ordinarily called Institor. "Institor appellatus est ex eo, quod negotio gerendo instet; nec multum facit, tabernæ sit præpositus, an cuilibet alii negotiationi.[4] Pravi autem refert, quis sit institor; masculus an fœmina; liber, an servus; proprius vel alienus: — Item, quisquis præposuit; nam, et si mulier præposuit competit institoria (actio), exemplo exercitoriæ actionis; et, si mulier sit præposita, tenebitur etiam ipsa. Sed et, si filia familiâs sit, vel ancilla præposita, competit institoria actio. Pupillus autem institor obligat eum, qui eum præposuit, institoriâ actione; quo-

[1] Co. Litt. 58 a; Com. Dig. *Attorney*, C. 4; Id. *Baron & Feme*, D.

[2] Thomson on Bills, p. 220 (2d ed.), 1836.

[3] [So a father may be a son's agent in negotiating a purchase of land. Reeves *v.* Kelly, 30 Mich. 132, and a son may act as his father's agent to purchase lumber for the purpose of enlarging the latter's house. Chase *v.* Snow, 52 Vt. 525. And a father, whose son acted as his clerk and sold liquors to a party in his father's house, was held to be guilty of making an illegal sale. Commonwealth *v.* Holmes, 119 Mass. 195. — Ed.]

[4] Dig. Lib. 14, tit. 3, l. 3; Id. l. 5, Introd. and §§ 1–4; Pothier on Oblig. by Evans, n. 74–82, n. 447, 456; 1 Bell, Comm. 385 (4th ed.); Id. p. 478–481 (5th ed.); 1 Domat, B. 1, tit. 16, § 3, arts. 1, 4, 5; Pothier, Pand. Lib. 14, tit. 3, n. 1, 3, 4, 5, 6, 17, 18; Id. Lib. 14, tit. 1, n. 11, 12; 1 Stair, Inst. by Brodie, B. 1, tit. 12, § 19. In another passage the definition of Institor is somewhat differently given: Institor est, qui tabernæ, locove, ad emendum vendendumve, præponitur, quique sine loco ad eundem actum præponitur. Dig. Lib. 14, tit. 3, l. 18. Mr. Bell, in his commentaries on the Laws of Scotland, Vol. 1, p. 385 (4th ed.); Id. pp. 479, 480 (5th ed.), says, that the charge given to a clerk to manage a store or shop is called Institorial power. See, also, 1 Stair, Inst. by Brodie, B. 1, tit. 11, §§ 12, 18, 19; Ersk. Inst. B. 3, tit. 3, § 46.

niam sibi imputare debet, qui eum præposuit. Nam plerique pueros puellasque tabernis præponunt." [1]

§ 9. But although all persons *sui juris*, are in general (as we have seen) capable of becoming agents; yet we are to understand, that they cannot at the same time take upon themselves incompatible duties and characters; or become agents in a transaction, where they have an adverse interest, or employment.[2] Thus, a person cannot act as agent in buying for another, goods belonging to himself; and at a sale made for his principal, he cannot become the buyer.[3] Neither can he, when holding a fiduciary relation, such as trustee, guardian, attorney, or agent, contract with the same general binding force with his principal, as in ordinary cases, where such a relation does not exist.[4] And a memorandum, made and signed by a seller, at the request of the purchaser, will not bind the latter, as a memorandum within the statute of frauds, on account of this incompatibility of character.[5]

§ 10. The civil law recognized in the fullest manner the same doctrine. "Tutor rem pupilli emere non potest. Idemque porrigendum est ad similia, id est, ad curatores, procuratores, et qui negotia aliena gerunt.[6] The reason is laid down in another passage; that there is a natural incompatibility between the interest of the buyer and that of the seller. "Quemadmodum in emendo

[1] Dig. Lib. 14, tit. 3, l. 7, §§ 1, 2; Id. l. 8; 1 Domat, B. 1, tit. 16, art. 4; Pothier, Pand. Lib. 3, tit. 3, n. 17. Heineccius may be thought to have drawn a somewhat broader inference; and to have insisted, that persons, generally disabled to act in their own affairs, were disabled to act as agents for others. Ex eodem inferimus (says he) naturâ inhabiles ad negotia aliorum gerenda, procuratores esse non posse; veluti furiosos, mente captos, infantes, surdos et mutos, minores annis (septemdecim). Heinecc. ad Pand. Lib. 3, tit. 3, § 425. But he, most probably, referred to such mental incapacity, as deprived them of a suitable discretion to perform the duties of an agent. See Pothier, Pand. Lib. 3, tit. 3, n. 19, 20; 1 Domat, B. 1, tit. 16, art. 4.

[2] 1 Story on Eq. Jurisp. §§ 315, 316; Post, §§ 10, 210, 211.

[3] Massey *v.* Davies, 2 Ves. Jr. 317; Post, §§ 210, 211, 213. [Thus, a stockbroker cannot turn over to his principal, who has employed him to go into market and purchase, wheat which he himself holds, although he only charges market price for the same. Tewksbury *v.* Spruance, 75 Ill. 187; Taussig *v.* Hart, 58 N. Y. 425; Charter *v.* Trevellyan, 11 Cl. & F. 714; Bunker *v.* Miles, 30 Me. 431; Walker *v.* Palmer, 24 Ala. 358. — Ed.]

[4] 1 Story on Equity, §§ 308–328.

[5] Wright *v.* Dannah, 2 Camp. 203; Dixon *v.* Bromfield, 2 Chitty, 205; Fairbrother *v.* Simmons, 5 B. & Ald. 333.

[6] Dig. Lib. 18, tit. 1, l. 34, § 7; Post, § 213.

et vendendo naturaliter concessum est, quod pluris sit, minoris emere; quod minoris sit, pluris vendere; et ita invicem se circumscribere."[1] Or, as it is elsewhere said: "In pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire."[2] Cujacius has expounded the bearing of this doctrine on various occasions; and more especially, where he says: "Nec enim unquam aliquis quidquam vendibit sibi, sed alii. Denique idem homo emptoris et venditoris officio fungi non potest. Cum vero idem non esset constitutum de curatore, puta, rem adolescentis vel furiosi, vel prodigi, curatorem emere non posse. Nec de Procuratore negotiorum constituto ex mandato, vel immiscente se negotiis alienis sine mandato, non posse hunc quoque etiam quidquam emere de rebus domini, ad quem negotia pertinent.'[3]

§ 11. In the next place, as to the subject-matter of an agency. Although, in general, what a person *sui juris* may do himself, he may delegate authority to another to do for him; yet there are exceptions to the doctrine. Thus, although a person may do an unlawful act, it is clear that he cannot delegate authority to another person to do it; for it is against the policy of the law to allow any such authority, and therefore the appointment is utterly void. It imports neither duty, nor obligation, nor responsibility, on either side; although it may involve both in punishment; "Consentientes et agentes pari pœna plectentur."[4] And this is clearly the dictate of natural justice; and as such is recognized in

[1] Dig. Lib. 19, tit. 2, l. 22, § 3; Post, § 210.

[2] Dig. Lib. 4, tit. 4, l. 16, § 4; Post, §§ 210, 213.

[3] Cujacii Opera, Tom. 6, p. 90, ad Lib. 12; Dig. Salvii Juliani (ed. Neap. 1758); Id. Tom. 4, p. 963, C. Comm. in Lib. 3, Resp. Papin.; Id. Tom. 1, p. 968, C. ad tit. de minor. 25 annis; Dig. Lib. 4, tit. 4. See also Dig. Lib. 26, tit. 8, l. 5, § 2. Mr. Livermore has cited another passage, 1 Liverm. on Agency, 417, note (ed. 1818), from Cujacius; as contained in Cujac. ad Dig. Lib. 4, 4, 16, 4; Cujac. Opera, Tom. 1, p. 998 (ed. 1755). It is: "Emptor emit quam minimo potest, venditor vendit quam maximo potest." I do not find the passage in the place cited. But in Cujac Comm. in Lib. 3, Respons. Papin. Cujac. Opera, Tom. 4, p. 963 (ed. 1758), ad § Cum. Inter. [Dig. Lib. 46, tit. 1, l. 51, § 4], is the following passage: "Hæc scilicet est natura contractus emptionis et venditionis, ut vendat unus quanto pluris, emat alter quanto minoris possit." Post, § 210, and note.

[4] Fitzherbert's case, 5 Co. R. 80. [So a deed executed in time of war within the United States lines to citizens of the United States by the attorney of the grantor, while the grantor is within the Confederate lines and an alien enemy, is void as a contract between enemies. Filor *v.* United States, 3 Nott & Huntington's Court of Claims Rep. 25.]

the civil law. "Rei turpis nullum mandatum est.[1] Illud, quoque, mandatum non est obligatorium, quod contra bonos mores est; veluti, si Titius de furto, aut de damno faciendo, aut de injuriâ faciendâ mandat tibi; licet enim pœnam istius facti nomine præstiteris, non tamen ullam habes adversus Titium actionem."[2]

§ 12. But there are other exceptions of a different character, and standing upon different principles. They arise from this, that the act to be done is of a personal nature, and incapable of being delegated; or that it is a personal trust or confidence, and therefore by implication prohibited from being delegated.[3] Examples of both sorts are to be found in the common law. Thus, a person cannot do homage or fealty by attorney; for it is deemed inseparably annexed to the man doing it as a personal service. So, although, by the ancient common law, a lord might beat his villein for cause or without cause; yet he could not delegate his authority to another to beat his villein without cause.[4]

§ 13. For a like reason, one, who has a bare power or authority

[1] Dig. Lib. 17, tit. 1, l. 6, § 3; Post, § 20.

[2] Inst. Lib. 3, tit. 26, § 7. Mr. Livermore's remarks on this subject are worthy of the attention of the learned reader. 1 Liverm. on Agency, § 2, pp. 14–23 (ed. 1818).

[3] [Thus a general agent of an insurance company, whose duties call for the exercise of discretion, cannot delegate his authority to another. McClure *v.* Miss. Valley Ins. Co., 4 Mo. Ap. 148. Nor can arbitrators avail themselves of the assistance of any third party in deciding the questions submitted to them, although they can consult experts to aid them in making their decisions. Eads *v.* Williams, 4 De G. M. & G. 674; Whitmore *v.* Smith, 7 H. & N. 513; Haven *v.* Winnisimmet Co., 11 Allen, 377; Anderson *v.* Wallace, 3 Cl. & F. 26. Nor can a keeper appointed by a sheriff delegate his authority. Connor *v.* Parker, 114 Mass. 331. Nor can an agent delegate his authority where his trust is a judicial one. Baker *v.* Cave, 1 H. & N. 674; nor can the liquidators of a company authorize one of their number to accept bills. Agra Bank, *Ex parte*, L. R. 6 Ch. 206; and see Birmingham Banking Co., *In re*, L. R. 3 Ch. 651. A sexton, however, can delegate the performance of his duties to a deputy. Burial Board *v.* Thompson, L. R. 6 C. P. 445. But a general agent in charge of a building, whose duty it is to collect the rents and take general care of the building, cannot delegate his authority to another, nor employ an engineer to take charge of the engine. Crozier *v.* Reins, 4 Ill. App. 564. — Ed.]

[4] Combe's case, 9 Co. R. 76 a; Com. Dig. *Attorney*, C. 3. On the same account, where an act is required by statute to be done by the party, if it can be fairly inferred from the nature of the act, that it was intended to be personally done, it cannot be done by an attorney. Thus, for example, where a feme covert is authorized by the laws of a State to convey her right in any real estate by deed, duly acknowledged by her upon a privy examination of a magistrate, it may be presumed, that she cannot acknowledge the same by an attorney.

from another to do an act; must execute it himself, and cannot delegate his authority to another; for this being a trust or confidence reposed in him personally, it cannot be assigned to a stranger, whose ability and integrity might not be known to the principal, or who, if known, might not be selected by him for such a purpose.[1] Therefore, if a man has a power given to him by the owner to sell an estate,[2] or to make leases for him, he cannot act by an attorney or agent; for it is a personal trust. So, if, by a will, an executor has a power given to him to sell property;[3] or a person is vested with a power of appointment or distribution of property among certain persons, according to his discretion; in each case the power must be executed by him personally, and cannot be delegated to another.[4] So, a factor cannot ordinarily delegate his employment, as such, to another, so as to raise a privity between such third person and his principal, or to confer on him, as to the principal, his own rights, duties, or obligations.[5] The same rule applies to a broker; for he cannot delegate his authority to another to sign a contract in behalf of his principal, without the assent of the latter.[6] The reason is plain; for in each of these cases, there is an exclusive personal trust and confidence

[1] Bacon, Abridg. *Authority*, D.; Ersk. Inst. B. 3, tit. 3, § 34; 1 Liverm. on Agency, § 5, pp. 54–66 (ed. 1818); Com. Dig. *Attorney*, C. 3; 2 Kent, Comm. Lect. 41 (4th ed.), 633; Combe's case, 9 Co. R. 75 b; Blore *v.* Sutton, 3 Meriv. 237, 246; Schmaling *v.* Thomlinson, 6 Taunt. 147; Soley *v.* Rathbone, 2 M. & Selw. 298; Cockran *v.* Irlam, 2 M. & Selw. 301, 303, note; 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 4, p. 388 (4th ed.); Id. p. 482 (5th ed.); Emerson *v.* Providence Hat Manuf. Co. 12 Mass. 241, 242; Tippets *v.* Walker, 4 Mass. 597; Commercial Bank of Lake Erie *v.* Norton, 1 Hill, 501; [Lynn *v.* Burgoyne, 13 B. Monroe, 400].

[2] [Bocock *v.* Pavey, 8 Ohio St. 270.]

[3] Com. Dig. *Attorney*, C. 3; Combe's Case, 9 Co. R. 75; 1 Roll. Abr. *Authority*, E. l. 30; Bacon, Abridg. *Authority*, D. [But an executor has power through an agent to extend the time for payment of debt due the estate. Underwood *v.* Sample, 70 Ind. 446; and trustees can employ agents where there is an actual necessity for their use. Phelps *v.* Shrader, 14 Am. L. Rev. 799. — Ed.]

[4] 1 Roll. Abridg. *Authority*, C. l. 15; Ingram *v.* Ingram, 2 Atk. 88; Att.-Gen. *v.* Berryman, cited 2 Ves. 643.

[5] Catlin *v.* Bell, 4 Camp. 183; Soley *v.* Rathbone, 2 M. & Selw. 298; Cockran *v.* Irlam, 2 M. & Selw. 301, n.; Schmaling *v.* Thomlinson, 6 Taunt. 146; 1 Bell, Comm. 388, § 412 (4th ed.); Id. p. 482 (5th ed.). See also, Post, §§ 108, 110; [Merchants' Nat. Bank *v.* Trenholm, 12 Heisk. (Tenn.) 520].

[6] Henderson *v.* Barnwell, 1 Y. & Jerv. 387; 1 Bell, Comm. 388, § 412 (4th ed.); Id. p. 482 (5th ed.); Post, § 109. [But it has been held that a broker may authorize his clerk to make and sign a memorandum of a contract, in his presence, and when the clerk acts merely ministerially and exercises no discretion of his own. Williams *v.* Woods, 16 Md. 220.]

reposed in the particular party.[1] And hence is derived the maxim of the common law: *Delegata potestas non potest delegari.*[2] And the like rule prevailed, to some extent, in the civil law: *Procuratorem alium procuratorem facere non posse.*[3] It seems also to be the general rule of the Scottish law.[4]

§ 14. In general, therefore, when it is intended, that an agent shall have a power to delegate his authority, it should be given to him by express terms of substitution.[5] But there are cases, in

[1] [Thus a board of directors of a corporation cannot delegate their power to allot shares to a manager and to two of their number, Howard's Case, L. R. 1 Ch. 561: nor their power to buy shares, Cartmell's Case, L. R. 9 Ch. 691: nor can they mortgage future calls, as such calls are to be made in the exercise of their discretionary powers, Sankey Brook Coal Co., *In re*, L. R. 9 Eq. 721; *Ex parte* Stanley, 33 L. J. Ch. 535; Hughes *v.* Trew, 36 L. T. N. S. 585. And where by statute a corporation was authorized to lay assessments on its members, *held*, this power could not be delegated to the directors. Winsor, *Ex parte*, 3 Story, 411. Mayer *v.* McLure, 36 Miss. 394. And where directors were authorized to execute a lease in behalf of a corporation, *held*, they could not authorize a third party to make a binding lease. Gillis *v.* Bailey, 1 Foster, 149. Nor can a committee appointed to repair dams and fishways delegate such authority to a sub-committee of one. Stoughton *v.* Baker, 4 Mass. 522. Nor can an agent authorized to give a note delegate that power to another. Emerson *v.* Prov. Hat Co., 12 Mass. 237. Brewster *v.* Hobart, 15 Pick. 302. See also Despatch Line *v.* Bellamy Man. Co., 12 N. H. 226; Blore *v.* Sutton, 3 Mer. 237; Hoyt *v.* Thompson, 5 Smith, 216. A board of bank directors, however, may delegate authority to a committee of their number to convey the real estate of the bank. Burrill *v.* Nahant Bank, 2 Met. 163. — ED.]

[2] 2 Inst. 597; Branch's Maxims, 38; 2 Kent, Comm. Lect. 41, p. 633 (4th ed.); Catlin *v.* Bell, 4 Camp. 183; [Warner *v.* Martin, 11 How. 209, 223; Rossiter *v.* Trafalgar Life Ass. Co., 27 Beav. 377].

[3] See Dig. Lib. 49, tit. 1, l. 4, § 5; Lib. 14, tit. 1, l. 1, § 5; Id. Lib. 17, tit. 1, l. 8, § 3; Cujacii Opera, Tom. 10, p. 797 (ed. Neap. 1758); Heinecc. ad Pand. P. 1, Lib. 3, tit. 3, §§ 419–433; Ersk. Inst. B. 3, tit. 3, § 34; 2 Kent, Comm. Lect. 41, p. 633 (4th ed.); 1 Domat, B. 1, tit. 16, § 3, art. 3. This seems regularly true in the civil law, in cases of suits ante litem contestatam; and perhaps there might be the like qualifications annexed to the rule in some other cases. Dig. Lib. 14, tit. 1, l. 1, § 5; Dig. Lib. 17, tit. 1, l. 8, § 3; Pothier, Pand. Lib. 14, tit. 1, n. 1, 2, 3; Ib. Lib. 17, tit. 1, n. 23; 1 Domat, B. 1, tit. 16, § 3, art. 3. Erskine, in his Institutes (B. 3, tit. 3, § 34), says, that by the Roman law, a mandatary might have committed the execution of the mandate to any third person; and for this he cites the Digest, Lib. 17, tit. 1, l. 8, § 3. The passage seems to prove, that the action, mandati actio, would lie against the second mandatary in cases where the agency was for the administration of private affairs. Did the rule as to substitution, apply to the case of an institor, or common clerk in a shop? See the Digest, Lib. 14, l. 1, § 5; 1 Domat, B. 1, tit. 16, § 3, art. 3.

[4] 1 Stair, Inst. by Brodie, B. 1, tit. 12, § 7, p. 129; Ersk. Inst. B. 3, tit. 3, § 34.

[5] Commercial Bank of Lake Erie *v.* Norton, 1 Hill, 505.

which the authority may be implied; as where it is indispensable by the laws, in order to accomplish the end; or it is the ordinary custom of trade; or it is understood by the parties to be the mode in which the particular business would or might be done.[1] Thus, if a person should order his goods to be sold by an agent at public auction; and the sale could only be made by a licensed auctioneer, the authority to substitute him in the agency, so far as the sale is concerned, would be implied.[2] So where, by the custom of trade, a ship-broker, or other agent, is usually employed to procure a freight or charter-party for ships, seeking a freight, the master of such a ship, who is authorized to let the ship on freight, will incidentally have the authority to employ a broker, or agent for the owner, for this purpose. And the same principle will apply to a factor, where he is, by the usage of trade, authorized to delegate to another the authority to substitute another person to dispose of the property.[3] In short, the true doctrine, which is to be deduced from the decisions is (and it is entirely coincident with the dictates of natural justice), that the authority is exclusively personal, unless from the express language used, or from the fair presumptions, growing out of the particular transaction, or of the

[1] Coles *v.* Trecothick, 9 Ves. 234, 251, 252; 1 Bell, Comm. 387–391, § 412 (4th ed.); Id. p. 482 (5th ed.); 3 Chitty on Com. & Manuf. 206; Shipley *v.* Kymer, 1 M. & Selw. 484; Cockran *v.* Irlam, 2 M. & Selw. 301, 303, note; Laussatt *v.* Lippincott, 6 Serg. & R. 386; Johnson *v.* Cunningham, 1 Ala. 249, N. S. [Thus, where a draft payable at a distant place is left with a bank for collection, it will be presumed that the bank will transmit it to a sub-agent at the place where it is payable for collection, and the assent of the principal will be implied to such action. Dorchester, &c. Bank *v.* N. E. Bank, 1 Cush. 177; Appleton Bank *v.* McGilvray, 4 Gray, 522; Planters' Bank *v.* First Nat'l Bank, 75 N. C. 534. So an agent may delegate his authority when allowed by a lawful custom or usage, provided the intrinsic character of the contract is not changed thereby. Robinson *v.* Mollett, L. R. 7 H. L. 802. Thus an insurance agent can authorize his clerk to contract for risks, deliver policies, and collect premiums, Bodine *v.* Exch. Fire Ins. Co., 51 N. Y. 117: and even to sign a policy for him, Grady *v.* Am. Cen. Ins. Co., 60 Mo. 116. And one having authority to sign the name of another to a subscription paper may procure a third to do it in his presence. Norwich University *v.* Denny, 47 Vt. 13. And see Peterson *v.* Christenson, 26 Minn. 581; Commercial Bank *v.* Norton, 1 Hill, 501; Williams *v.* Woods, 16 Md. 220; Quebec R. R. Co. *v.* Quinn, 12 E. F. Moore, 233; Chase *v.* Ostrom, 50 Wisc. 640. — Ed.]

[2] See Laussatt *v.* Lippincott, 6 Serg. & R. 386.

[3] See Cockran *v.* Irlam, 2 M. & Selw. 301, 303, note; Goswell *v.* Dunkley, 1 Str. 680, 681; Bromley *v.* Coxwell, 2 Bos. & Pull. 438; Gray *v.* Murray, 3 John. Ch. 167, 178; Laussatt *v.* Lippincott, 6 Serg. & R. 386; Post, § 110; [Darling *v.* Stanwood, 14 Allen, 504].

usage of trade, a broader power was intended to be conferred on the agent.[1]

§ 15. But although it is regularly true in our law (for it seems to have been otherwise in the civil law), that an agent cannot, without such express or implied permission, delegate his authority, so far as the principal is concerned; yet the substituted agent may still be responsible to the original agent for his acts under the substitution, inasmuch as the latter is, in some cases, responsible to the principal for the acts of the sub-agent.[2] And this is upon the same enlarged principle, which governs in the civil law; that the act is not to be treated as void between the agent and his substitute, unless, indeed, the principal should interfere and prohibit the substitute from acting. "Si quis mandaverit alicui gerenda negotia ejus, qui ipse sibi mandaverat, habebit mandati actionem, quia et ipse tenetur; tenetur autem quia agere potest."[3]

§ 16. We have thus seen, that, for the most part, where a party is of ability to do an act himself, he may do it by an attorney or agent. But there are cases, in which the act must be done by an agent or attorney, and cannot be done by the principal.[4] Thus, for example, an aggregate corporation, being a mere artificial being, cannot act, except through the instrumentality of an agent or attorney, either specially pointed out by the act of incorporation, or specially authorized by the corporation to act in its behalf.[5] And, therefore, such a corporation cannot levy a fine, or acknowledge a deed, or appear in a suit, except by an attorney or agent.[6] And the like rule existed in the civil law, for it was one of the privileges of a corporation (*universitas*) by the civil law, to act, by means of an

[1] 1 Bell, Comm. 388 (4th ed.); Id. p. 482 (5th ed.); Ersk. Inst. B. 3, tit. 3, § 34; 2 Kent, Comm. Lect. 41, p. 633 (4th ed.); Mark *v.* Bowers, 16 Martin, 95; 1 Domat, B. 1, tit. 16, § 3, art. 2, 3; Cockran *v.* Irlam, 2 M. & Selw. 301, 303, note; Catlin *v.* Bell, 4 Camp. 183, 184.

[2] Post, §§ 201, 217, 321, 322; [Bank of Ky. *v.* Adams Express Co., 93 U. S. 174].

[3] Dig. Lib. 17, tit. 1, l. 8, § 3; Ersk. Inst. B. 3, tit. 3, § 34; Pothier, Pand. Lib. 17, tit. 1, n. 23; Ante, § 13, and note. See also Murray *v.* Toland, 3 John. Ch. 573; Post, § 217.

[4] Post, § 201.

[5] Co. Litt. 66 b; [Totterdell *v.* Fareham Co., L. R. 1 C. P. 674; Atchison & Nebr. R. R. Co. *v.* Reecher, 24 Kan. 228; Home Life Ins. Co. *v.* Pierce, 75 Ill. 426].

[6] Com. Dig. *Attorney*, C. 2.

agent or attorney, who was known by the name of actor, or procurator, or, more familiarly, by the name of syndic. "Quibus autem permissum est corpus habere collegii, societatis, &c., et actorem, sive syndicum, per quem, tamquam in republicâ, quod communiter agi fierique oporteat, agatur, fiat." [1]

§ 17. Let us, in the next place, proceed to the consideration of the nature and extent of the authority, which may be thus delegated to an agent. It is commonly divided into two sorts; (1.) a special agency; (2.) a general agency. A special agency properly exists, when there is a delegation of authority to do a single act; a general agency properly exists where there is a delegation to do all acts connected with a particular trade, business, or employment.[2] Thus, a person, who is authorized by his principal to execute a particular deed, or to sign a particular contract, or to purchase a particular parcel of merchandise, is a special agent. But a person, who is authorized by his principal to execute all deeds, sign all contracts, or purchase all goods required in a particular trade, business, or employment, is a general agent in that trade, business, or employment.

§ 18. A person is sometimes (although perhaps not with entire accuracy) called a general agent, who is not appointed with powers so general, as those above mentioned; but who has a general authority in regard to a particular object or thing; as, for example, to buy and sell a particular parcel of goods, or to negotiate a particular note or bill; his agency not being limited in the buying or selling such goods, or negotiating such note or bill, to any particular mode of doing it.[3] So an agent, who is appointed to do a par-

[1] Dig. Lib. 3, tit. 4, l. 1, § 1; Id. l. 6, § 1; Pothier, Pand. Lib. 3, tit. 4, n. 3, 9; Vicat. Vocabal. Syndicus; Heinecc. ad Pand. P. 1, Lib. 3, tit. 3, § 419; Id. tit. 4, 439; Pothier on Oblig. n. 49.

[2] 3 Chitty on Com. & Manuf. 198, 199; 2 Kent, Comm. Lect. 41, pp. 620, 621 (4th ed.); Parker *v.* Kett, 1 Salk. 96, 97; Whitehead *v.* Tuckett, 15 East, 408; Anderson *v.* Coonley, 21 Wend. 279; Tomlinson *v.* Collet, 3 Blackf. Ind. 436; Walker *v.* Skipwith, Meigs's Tenn. 502; Post, §§ 126–134, especially notes to §§ 127 and 133. [A general agent is one authorized to transact all the business of the principal, or all of a particular kind, or at a particular place, and the principal is liable, although he violates his private instructions. Cruzan *v.* Smith, 41 Ind. 288; Palmer *v.* Cheney, 35 Iowa, 281; Savage *v.* Rix, 9 N. H. 263; Farmers' Bank *v.* Butchers' Bank, 16 N. Y. 148. But the position of general business manager is not one to which the law affixes any definite measure of authority. Swazey *v.* Un. Man. Co., 42 Conn. 556; U. S. *v.* Howard, 7 Biss. 56. — Ed.]

[3] Whitehead *v.* Tuckett, 15 East, 408; 1 Domat, B. 1, tit, 16, § 3, art. 10;

ticular thing in a prescribed mode, is often called a special agent, as contradistinguished from a general agent.[1]

§ 19. On the other hand (although this is not the ordinary commercial sense), a person is sometimes said to be a special agent, whose authority, although it extends to do acts generally in a particular business or employment, is yet qualified and restrained by limitations, conditions, and instructions of a special nature. In such a case the agent is deemed, as to persons dealing with him in ignorance of such special limitations, conditions, and instructions, to be a general agent; although, as between himself and his principal, he may be deemed a special agent.[2] In short, the true distinction (as generally recognized) between a general and a special agent (or, as he is sometimes called, a particular agent), is this: a general agency does not import an unqualified authority, but that which is derived from a multitude of instances, or in the general course of an employment or business; whereas a special agency is confined to an individual transaction.[3]

§ 20. The same distinction was well known in the civil law. Thus, it is said, "Procurator autem vel omnium rerum, vel unius rei esse potest."[4] And although it seems to have been at one time doubted, whether a procuration was properly created by the mere delegation of authority to do a single act, yet that doubt was deemed to be unfounded: "Sed verius est, eum quoque procuratorem esse, qui ad unam rem datus sit."[5] And a procuration might either be limited or unlimited; conditional or absolute; restrictive or unqualified; provided it was not unlawful: "Item, Mandatum et in

Anderson *v.* Coonley, 21 Wend. 279. [See London Savings Society *v.* Hagerstown Bank, 36 Penn. St. 498.]

[1] Andrews *v.* Kneeland, 6 Cowen, 354.

[2] See Fenn *v.* Harrison, 3 T. R. 757, 760, 762; Whitehead *v.* Tuckett, 15 East, 400, 408; 3 Chitty on Com. & Manuf. 198, 199; 2 Kent, Comm. Lect. 41, pp. 620, 621 (4th ed.); Anderson *v.* Coonley, 21 Wend. 279; [Bryant *v.* Moore, 26 Me. 84; Johnson *v.* Jones, 4 Barb. Sup. Ct. (N. Y.) 369].

[3] Whitehead *v.* Tuckett, 15 East, 400, 408; Id. 200, 201; Andrews *v.* Kneeland, 6 Cowen, 354.

[4] Dig. Lib. 3, tit. 3, l. 1, § 1; 1 Domat, B. 1, tit. 15, § 1, art. 7; Pothier, Pand. Lib. 3, tit. 3, n. 3–8.

[5] Dig. Lib. 3, tit. 3, l. 1, § 1; 1 Domat, B. 1, tit. 15, § 1, art. 7; 1 Stair Inst. by Brodie, B. 1, tit. 12, § 11. Heineccius says: Et quia non ambigitur, vel omnium negotiorum bonorumque administrationem, vel unius rei, mandare posse; procuratores etiam in universales et singulares dividuntur. Heinecc. ad Pand. Pt. 1, Lib. 3, tit. 3, § 417. By universales in this passage, Heineccius means, what we are accustomed to call, general agents; and by singulares, special agents.

diem differi, et sub conditione contrahi potest. Rei turpis nullum mandatum est."[1]

§ 21. At present it is not necessary to say more upon the subject of general agency and special agency, as contradistinguished from each other; inasmuch as it will hereafter occur in other connections.[2] But the distinction between them, as to the rights and responsibilities, the duties and the obligations, both of principals and agents, is very important to be carefully observed, as the doctrines applicable to the one sometimes totally fail in regard to the other.[3] It may, perhaps, be well to add (what, indeed, has been already intimated), that general agents are to be carefully distinguished from universal agents; that is, from agents, who may be appointed to do all the acts, which the principal can personally do, and which he may lawfully delegate the power to another to do. Such an universal agency may potentially exist; but it must be of the very rarest occurrence. And, indeed, it is difficult to conceive of the existence of such an agency practically, inasmuch as it would be to make such an agent the complete master, not merely *dux facti*, but *dominus rerum*, the complete disposer of all the rights and property of the principal. It is very certain, that the law will not from any general expressions, however broad, infer the existence of any such unusual agency; but it will rather construe them as restrained to the principal business of the party, in respect to which, it is presumed, his intention to delegate the authority was principally directed.[4] Thus, for example, if a merchant, about to go abroad for temporary purposes, should delegate to an agent his full and entire authority to sell any of his personal property, or to buy any property for him, or on his account, or to make any contracts, and also to do any other acts whatsoever, which he could, if personally present; this general language would be construed to apply only to buying or selling, connected with his ordinary business as a merchant; and would not, at least without some more specific designation, be construed to apply to a sale of his household furniture, or his library, or the common utensils, provisions, and other necessaries used in his family. Much less would it be construed to authorize any contracts to be made, which

[1] Dig. Lib. 17, tit. 1, l. 1, § 3, Lib. 17, tit. 1, l. 6, § 3, Lib. 3, tit. 3, l. 1; Id. Pothier, Pand. Lib. 17, tit. 3, n. 3, 19, 20. Note, § 11.

[2] Post, §§ 126–134.

[3] See Post, §§ 126–134.

[4] See 3 Chitty on Com. & Manuf. 198–200; Post, §§ 62–68.

would be of an extraordinary or personal character, such as a contract of marriage, or a marriage settlement, or a sale of such things as would break up and destroy his business as a merchant in his particular trade.[1]

§ 22. And in relation to general agency, one man may be a general agent for his principal in one business, and another may be his general agent in another business; and in such case each agent will be limited in his authority to the particular business within the scope of his peculiar agency. Thus, for example, if a man should be at once a banker and a merchant, carrying on each business distinctly, with separate clerks and agents for each branch, an agent in the one would not be deemed to possess any authority to act in the other; although each would, or might, in a legal sense, be deemed a general agent.

[1] See 3 Chitty on Com. & Manuf. 199, 200; Kilgour *v.* Finlyson, 1 H. Bl. 155; Howard *v.* Baillie, 2 H. Bl. 618; Hay *v.* Goldsmidt, 1 Taunt. 349; Atwood *v.* Munnings, 7 B. & Cressw. 278. See, when an agent has authority to borrow money or not, Hawtwayne *v.* Bourne, 7 Mees. & Wels. 595, 599. [So a general agent to lease lands cannot by leasing his own land with that of his principal, make his principal, without his knowledge or assent, a joint lessor of the agent's lands so as to make the principal jointly liable with him upon the stipulations in the lease in reference to the agent's property as well as the principal's. La Point *v.* Scott, 36 Vt. 603; Cochran *v.* Newton, 5 Denio, 49; Kelley *v.* Lindsey, 7 Gray, 287.]

CHAPTER III.

DIFFERENT KINDS OF AGENTS.

§ 23. In the next place, as to the different kinds or classes of Agents. It will be found very difficult to enumerate them all in detail; but it may not be without use to state some of those which have acquired a distinctive appellation; as it may serve to give us a more exact view of the nature of the rights, the obligations, and the duties of each. For the want of a due discrimination in this respect, very erroneous inferences are frequently deduced from the reported decisions; which decisions, however correct with reference to the class of agents embraced therein, will often be found to mislead, unless taken with the implied and tacit qualifications applicable to that peculiar class of agency.

§ 24. First. Attorneys. This class is divisible into two kinds, differing very widely in their rights, duties, obligations, and responsibilities: (1.) Attorneys in law; (2.) Attorneys in fact.[1] The former class includes those persons who are ordinarily intrusted with the management of suits and controversies in courts of law and other judicial tribunals; answering to the *Procuratores ad litem* of the civil law in many particulars, although not perhaps in all respects clothed with as extensive an authority.[2] Among these are attorneys in courts of common law, solicitors in courts of equity, and proctors in courts of admiralty and in the ecclesiastical courts.[3] These are wholly distinguishable from advocates or counsel in the Roman and English courts, although not generally

[1] Heinecc. ad Pand. Pt. 1, Lib. 3, tit. 3, § 416.

[2] 3 Black. Comm. 25; Co. Litt. 51, 52 a. In the civil law, no person could appoint a procurator ad litem, except he was the dominus litis. The plaintiff himself (actor) was, before the contestation of the suit (ante litem contestatem), the sole dominus litis. But his procurator, after the contestation of the suit, became dominus litis; and then, but not before, he could delegate his authority to another procurator. Quod quis sibi debitum exigere tibi mandavit ante litis contestationem, tu alii petendum mandare non potes. Cod. Lib. 2, tit. 13, l. 8; Heinecc. ad Pand. Pt. 1, Lib. 3, tit. 3, §§ 421–423, 431; Pothier, Pand. Lib. 3, tit. 3, n. 21.

[3] 3 Bl. Comm. 25.

in the American courts. In the Roman courts, the office of an advocate was, and in the English courts it is, purely honorary and gratuitous; that is to say, he is not entitled to charge or recover against his client any compensation for his services; as an attorney, solicitor, or proctor may. But whatever he receives for his services, is deemed to be an honorary donation, — *quiddam honorarium*.[1] Indeed, the Roman law, at least under the emperors, affected to treat it as a degradation of the order to serve for hire, or in any other manner than gratuitously and for reputation. "Apud Urbem autem Romanam etiam honoratis, qui hoc officium putaverint eligendum, eo usque liceat orare, quibusque maluerint; videlicet, ut non ad turpe compendium stipemque deformem hæc arripiatur occasio; sed laudis per eam augmenta quærantur. Nam si lucro pecuniâque capiantur, veluti abjecti atque degeneres inter vilissimos numerabuntur."[2] The theory of the English law was, perhaps, originally the same; but it has ceased to be known, except as a mere theory. As advocates are not in England entitled to recover their fees in a suit at law, they receive them in advance of their services, not indeed as a mere compensation *pro opere et labore;* but as a liberal emolument (*quiddam honorarium*) for the performance of the highest intellectual and moral duties for their clients in courts of justice;[3] a trust, which, to the honor of the bar, it may be said, they discharge with the most fearless and exalted ability and independence.[4] Nor, indeed, can one easily

[1] 3 Bl. Comm. 27-29; Com. Dig. *Attorney*, B. 18. [Labor for hire was considered disgraceful among the Romans. There were, however, certain professions the citizen could follow without a loss of respect, provided he did not receive wages (*merces*). One of these was the profession of an advocate. The advocate, as well as the followers of such other professions, provided for his family, and at the same time preserved his self-respect by calling his pay by another name, *honorarium*. He sued for it, not to be sure by an ordinary action, but by a *cognitio extraordinaria*, and recovered a fixed sum if the amount had been previously agreed upon, and in the absence of agreement he recovered what his services were reasonably worth, — not exceeding, however, the amount of one hundred pieces of gold for a single case, that being the limit prescribed by law. Dig. Lib. 50, tit. 13.—G.]

[2] Cod. Lib. 2, tit. 6, l. 6, § 5; Pothier, Pand. Lib. 3, tit. 1, n. 17.

[3] 3 Bl. Comm. 28; 2 Domat, Public Law, B. 2, tit. 6, § 2, art. 5.

[4] I cannot but quote here, with great pleasure, the remarks made upon a very recent occasion by Lord Langdale in Hutchinson *v.* Stephens (1 Keen, 668). "With respect to the task (said he), which I may be considered to have imposed upon counsel, I wish to observe, that it arises from the confidence, which long experience induces me to repose in them, and from a sense which I entertain of the truly honorable and important services which they constantly per-

forget the dignified admonition of the Roman law on the true duties of an advocate, an admonition which should be present to the thoughts of every person practising in any court of justice. "Ante omnia autem universi Advocati ita præbeant patrocinia jurgantibus, ut non ultra, quam litium poscit utilitas in licentiam conviciandi, et male dicendi temeritatem prorumpant. Agant, quod causa desiderat; temperent se ab injuriâ. Nemo ex industriâ protrahat jurgium."[1] But, as it is not our design in the present work to consider the rights, powers, duties, and obligations of persons acting as attorneys, or as advocates, in courts of justice, this subject will not be further pursued.[2]

form as ministers of justice, acting in aid of the judge, before whom they practise. No counsel supposes himself to be the mere advocate or agent of his client, to gain a victory, if he can, on a particular occasion. The zeal and the arguments of every counsel, knowing what is due to himself and his honorable profession, are qualified, not only by considerations affecting his own character as a man of honor, experience, and learning, but also by considerations affecting the general interests of justice. It is to these considerations that I apply myself; and I am far from thinking that any counsel, who attends here, will knowingly violate, or silently permit to be violated, any established rule of the court, to promote the purpose of any client, or refuse to afford me the assistance which I ask in these cases."

[1] Cod. Lib. 2, tit. 6, l. 6, §§ 1, 4; Pothier, Pand. Lib. 3, tit. 1, n. 20; 2 Domat, B. 2, tit. 6, § 2, art. 1–5.

[2] See Comm. Dig. *Attorney*, B. 1–20. Domat has well remarked, that all these rules of the duties of advocates may be reduced to two maxims: one, never to defend a cause which is unjust; and the other, not to defend just causes but by the way of justice and truth. And these two maxims are so essential to the duties of advocates, and so indispensably necessary, that, although they seem to be rather maxims of religion, they are, however, in proper terms, expressed in the Laws of the Code and the Digest. 2 Domat, by Strahan, B. 2, tit. 6, § 2, sub. fin. p. 620 (ed. 1822). Patroni autem causarum, &c., juramentum præstent, quod omni quidem virtute suâ omnique ope, quod verum et justum existimaverint, clientibus suis inferre procurabunt; nihil studii relinquentes, quod sibi possibile est. Non autem credita sibi causa cognita, quod improba sit, vel penitus desparata, et ex mendacibus allegationibus composita, ipsi scientes prudentesque malâ conscientiâ liti patrocinabuntur; sed et si certamine procedente aliquid tale sibi cognitum fuerit, a causâ recedent, ab hujusmodi communione sese penitus separantes. Such is the oath and such the doctrine prescribed to lawyers in the days of Justinian. Cod. Lib. 3, tit. 1, l. 14, § 1. How well worthy is the doctrine for the consideration of Christian lawyers in our day!

[*Attorneys in Law.* — The relation of attorney, or solicitor, and client is governed in great degree by the same rules which are applicable to other cases of agency. The client is the principal and the attorney is the agent, clothed with an apparent general authority in the management of the cause. The attorney's duty is to follow his client's instructions; to observe every limitation placed upon his general authority; and to act with perfect good faith

§ 25. Secondly. ATTORNEYS IN FACT. These are so called in contradistinction to attorneys in law, or *procuratores ad litem*, and

and with a single view to his client's interests, and with the usual skill of members of his profession. If he violate his duty, he is liable to an action by his client, although he acted within the scope of his apparent authority.

Appearance. — At common law, when any one was commanded by the King's writ to appear in court, he was obliged to do so, in person, and could not appear by attorney; but Glanville says (De Legibus, liber 11, ch. 1) that after the party had once appeared, that "in suits concerning the right and propriety and some other pleas, the party might prosecute either by himself or his attorney (*responsalis*). The appointment (of the attorney) was made by the party personally in court, and usually before the justices of the Common Pleas." By the Statute 13 Edw. I. ch. 10, a party was allowed to "make a general attorney" in all pleas moved for or against him during the circuit, until they were determined or "his master" removed him. According to Coke, in his comment on this statute, the attorney's authority is determined by the judgment, for thereby the plea is determined; after that, his only power is to sue out execution within a year, but having so sued out execution, he may prosecute it after the year. 2 Inst. 378; McHeath *v.* Ellis, 4 Bing. 578; Langdon *v.* Potter, 13 Mass. 319. Since this statute the right to appear by attorney has been without limitation. 3 Black. Comm. 26.

The appearance in a suit by an attorney is now presumed to be authorized by the party to the suit, and the burden of proof is upon the party denying his authority. Leavitt *v.* Wallace, 12 N. H. 489; Osborn *v.* Bank of U. S., 9 Wheat. 231; Thomas *v.* Steele, 22 Wisc. 207.

Where an attorney appears without authority in a cause, he is liable to the party for whom he appears, for any damages sustained by him in consequence of such action. Smith *v.* Bowditch, 7 Pick. 138; Henck *v.* Todhunter, 7 Har. & J. 275. How far, and under what circumstances, a party is bound by the act of an attorney who appears for him in a suit without authority, are questions which have been constantly under discussion in the courts of this country and England. If an attorney brings an action without the authority of the plaintiff, the latter is entitled to have the action dismissed without payment of costs, Reynolds *v.* Howell, L. R. 8 Q. B. 398; and the defendant in such a case can have all the proceedings set aside even after judgment, and compel the attorney to pay the costs. Doe *v.* Roe, 3 Dowl. o. s. 496; Robson *v.* Eaton, 1 T. R. 62; Hammond *v.* Thorpe, 1 Cromp. M. & R. 65. In Bayley *v.* Buckland, 1 Ex. 1, 6, the court says: "When, . . . a defendant, has been served with process, and an attorney without authority appears for him, we think the court must proceed as if the attorney really had authority; because, in that case, the defendant, having knowledge of the suit being commenced, is guilty of an omission in not appearing and making defence by his own attorney, if he has any defence on the merits. On the other hand, if the plaintiff, without serving the defendant, accepts the appearance of an unauthorized attorney for the defendant, he is not wholly free from the imputation of negligence. The law requires him to give notice to the defendant by serving the writ, and he has not done so. The defendant there is wholly free from blame, and the plaintiff not so; and, upon the same principle on which we before proceeded, we must set aside the judgment as irregular, with costs, and leave the plaintiff to recover those costs, and the expense to which he has been put, from the delinquent attorney, by summary proceedings."

may include all other agents employed in any business, or to do any act or acts *in pais* for another.[1] But it is sometimes used to

The American cases seem, on the whole, to sustain this doctrine, though they are not uniform.

See Campbell *v.* Bristol, 19 Wend. 101; Hill *v.* Mendenhall, 21 Wall. 453; Beckley *v.* Newcomb, 24 N. H. 359; Harshey *v.* Blackmarr, 20 Iowa, 161; Shelton *v.* Tiffin, 6 How. 163; Am. Ins. Co. *v.* Oakley, 9 Paige, 496; Kenyon *v.* Schreck, 52 Ill. 382.

Retainer for the Entire Cause. — The contract of an attorney to carry on or to defend a suit, or to do any other business, is in general an entire contract to conduct the suit or business to its termination. 1 Arch. Pr. by Chitty, 92; 2 Greenl. Ev. § 142. But he is not obliged to proceed with the action, if his client, after reasonable notice, neglects to supply him with adequate funds to pay his expenses out of pocket. Wadsworth *v.* Marshall, 2 Cromp. & J. 665. He is not entitled, however, to abandon his client arbitrarily at any stage he may think fit, and sue for his charges; and if he abandons the cause without giving his client reasonable notice, he will be liable in an action for damages. Hoby *v.* Built, 3 B. & Ad. 350. If his client neglect to supply him with funds after reasonable notice, he may sue for his charges up to that time. Vansandau *v.* Browne, 9 Bing. 402. And it seems that he may put an end to his employment by reasonable notice, and recover his charges. Harris *v.* Osbourn, 2 Cromp. & M. 629; and in Nicholls *v.* Wilson, 11 M. & W. 107, Parke, B., says: "There might be instances where he would be at liberty to do so without notice, because a case might occur so plain as not to require notice." See 1 Lush. Pr. 258.

Authority. — The authority of an attorney extends to the general conduct and management of the cause in which he is engaged. He has power to make admissions of fact, Lewis *v.* Sumner, 13 Met. 269: to bind his client by consent, Mole *v.* Smith, 1 Jac. & W. 673: to confess judgment, Gray *v.* Gray, 2 Roll. 63; Denton *v.* Noyes, 6 Johns. 296: to receive payment on judgment, Johnson *v.* Gibbons, 27 Gratt. (Va.) 632; Frazier *v.* Parks, 56 Ala. 363: to discontinue the action, Gaillard *v.* Smart, 6 Cow. 385: to substitute one security for another, Monson *v.* Hawley, 30 Conn. 51: to refer the action to arbitration, Filmer *v.* Delber, 3 Taunt. 486; Buckland *v.* Conway, 16 Mass. 396; Stokeley *v.* Robinson, 34 Pa. St. 315; Morris *v.* Grier, 76 No. Car. 410; Lee *v.* Grimes, 4 Col. 185: (but this right is denied in Haynes *v.* Wright, 4 Hay (Tenn.), 313): to appeal and bind his client by recognizance, Adams *v.* Robinson, 1 Pick. 461: to receive livery of seisin in behalf of his client, Pratt *v.* Putnam, 13 Mass. 361: to receive and receipt for money due his client, Miller *v.* Scott, 21 Ark. 396; Yoakum *v.* Tilden, 3 W. Va. 167: to subscribe and make oath to a petition in insolvency against his client's debtor, O'Neil *v.* Glover, 5 Gray, 144: to waive objections to the form of plaintiff's writ and notice, Alton *v.* Gilmanton, 2 N. H. 520: to direct and control an attachment of property made on mesne process, Jenny *v.* Delesdernier, 20 Me. 183: to discharge property from such an attachment, Moulton *v.* Bowker, 115 Mass. 36: to accept service of

[1] An act *in pais* is literally an act in the country; but the phrase is technically used to express any act done, which is not a matter of record or done in a court of record. 2 Black. Comm. 294.

designate persons, who act under a special agency, or a special letter of attorney, so that they are appointed *in factum*, for the deed, or act, required to be done.[1]

process and appear, Anderson *v.* Watson, 3 C. & P. 214; Richardson *v.* Daly, 4 M. & W. 384: to bring a new suit after being nonsuited, Scott *v.* Elmendorff, 12 Johns. 317: to proceed to have the issues tried if authorized to show cause against a rule *nisi*, Reg. *v.* Lichfield, 10 Q. B. 534: to remit damages after verdict, Lamb *v.* Williams, 1 Salk. 89: to attend a sheriff's sale under execution and buy in the property for his client, Fabell *v.* Boyken, 55 Ala. 383: to agree, during the pendency of an action, that, upon judgment for his client, the issuing of the execution shall be postponed, Union Bank of Georgetown *v.* Geary, 5 Pet. 99; Wieland *v.* White, 109 Mass. 392: but after judgment he cannot agree to postpone execution, Lovegrove *v.* White, L. R. 6 C. P. 440: to surrender a principal for whom his client is bail, Coolidge *v.* Cary, 14 Mass. 115. After judgment he has authority to institute supplementary proceedings, and procure the appointment of a receiver, Ward *v.* Roy, 69 N. Y. 96: to bring a writ of error to revise a judgment erroneously rendered against his client, Grosvenor *v.* Danforth, 16 Mass. 74: to give an officer indemnity for serving an execution in favor of his client, Clark *v.* Randall, 9 Wisc. 135: to direct and manage the execution, and to order the sheriff to withdraw from possession when goods have been seized on the same, Levi *v.* Abbott, 4 Ex. 588: to issue ca. sa. and cause the defendant's arrest, Hyams *v.* Michel, 3 Rich. 303: but after the defendant has been arrested he cannot discharge him from custody until the money has been paid for which the execution issued, Savory *v.* Chapman, 11 Ad. & El. 829; Connop *v.* Challis, 2 Ex. 484; Lewis *v.* Gamage, 1 Pick. 347: he must sue out *scire facias* against bail, and, if he does not, will be held responsible for negligence, Dearborn *v.* Dearborn, 15 Mass. 316: and if a party continues the authority of his attorney after judgment, he gives him the usual power of an attorney, including the power to bind him by compromise, Butler *v.* Knight, L. R. 2 Ex. 109.

Limits to Authority. — The attorney, however, is not the *dominus litis*. He has no implied authority to undertake journeys on behalf of his client, without special instructions, *In re* Snell, L. R. 5 Ch. Div. 815: nor can he sell or assign a judgment of his client, Maxwell *v.* Owen, 7 Coldw. (Tenn.) 630; Baldwin *v.* Morrill, 8 Humph. 139; Campbell's Appeal, 29 Pa. St. 401; Rowland *v.* State, 58 Pa. St. 196: nor sell a note left with him for collection, Goodfellow *v.* Landis, 36 Mo. 168: nor release sureties upon the claim of his client, Savings Inst. *v.* Chinn, 7 Bush (Ky.), 539; Givens *v.* Briscoe, 3 J. J. Marsh. 532; Union Bank *v.* Govan, 10 S. & M. 333: nor give up the security of his client without payment or express authority, Terhune *v.* Colton, 10 N. J. Eq. 21; Tankersley *v.* Anderson, 4 Desaus. 45: nor release the defendant's property from a lien created by levy of execution, or by obtaining judgment, Banks *v.* Evans, 10 S. & M. 35; Phillips *v.* Dobbins, 56 Ga. 617; Wilson *v.* Jennings, 3 Ohio St. 528; Benedict *v.* Smith, 10 Paige, 162: nor discharge a judgment except upon payment in full, Burr *v.* Hendrickson, 45 N. Y. 665; Lewis *v.* Woodruff, 15 How. Pr. 539; Wilson *v.* Wadleigh, 36 Me. 496; Harrow *v.* Farrow, 7 B. Mon. 126; Chambers *v.* Miller, 7 Watts, 63: nor receive any other thing than lawful money in payment of a claim sent him by his client for

[1] See Bacon's Abridg. *Attorney*.

§ 26. The most common classes of commercial agents are auctioneers, brokers, factors, consignees, supercargoes, ships'-husbands,

collection, Lawson *v.* Bettison, 7 Eng. 401; Kent *v.* Ricards, 3 Md. Ch. 392; Campbell *v.* Bailey, 19 La. Ann. 172; Wright *v.* Daly, 26 Texas, 730; West *v.* Ball, 12 Ala. 340; Walker *v.* Scott, 8 Eng. 644; Clark *v.* Kingsland, 1 S. & M. 248; Nolan *v.* Jackson, 16 Ill. 272; Miller *v.* Edmonstone, 8 Blackf. 291; Commissioners *v.* Rose, 1 Desaus. 469: he cannot receive, in such case, real estate, Stackhouse *v.* O'Hara, 14 Pa. St. 88: nor a bond, Maddux *v.* Beavan, 39 Md. 485; Smock *v.* Dade, 5 Randolph, 639: nor county warrants, Herriman *v.* Shomon, 24 Kansas, 387: nor notes of third parties, Jeter *v.* Haviland, 24 Ga. 252; Jones *v.* Ransom, 3 Ind. 327: nor Confederate notes, Harper *v.* Harvey, 4 W. Va. 539: nor depreciated money, Trumbull *v.* Nickerson, 27 Ill. 149: nor can he give an extension of time upon a debt due to his client even after receiving security, Lockhart *v.* Wyatt, 10 Ala. 231: nor release such a debt, Gilliland *v.* Gasque, 6 Rich. 406: nor collect a debt due his client by taking a discharge of the claim of the debtor against himself, Wiley *v.* Mahood, 10 W. Va. 206: nor discharge an indorser upon a note committed to him for collection, without satisfaction, or the express consent of his client, Kellogg *v.* Gilbert, 10 Johns. 220; Simonton *v.* Barrell, 21 Wend. 362; East River Bank *v.* Kennedy, 9 Bosw. 543; Bowne *v.* Hyde, 6 Barb. 392; Varnum *v.* Bellamy, 4 McLean, 87: nor indorse a note left with him for collection, Child *v.* Eureka Powder Works, 44 N. H. 354; White *v.* Hildreth, 13 N. H. 104: nor bind his client by an agreement for the sale of land, Burkhardt *v.* Schmidt, 10 Phil. 118: nor by an agreement to refund money overpaid: Ireland *v.* Todd, 36 Me. 149. Although in general, an attorney can control the manner of conducting a cause, it has been held that he cannot waive any substantial acquired right of his client, Howe *v.* Lawrence, 2 Zab. (N. J.) 99: nor release a party to make him a competent witness, York Bank *v.* Appleton, 17 Me. 55; Shores *v.* Caswell, 13 Met. 413; Weigel's Succession, 18 La. Ann. 49; Marshall *v.* Nagel, 1 Bailey, 308: nor accept service of process, Masterson *v.* Le Clair, 4 Minn. 163: nor discharge a trustee, Quarles *v.* Porter, 12 Mo. 76: nor consent to a judgment against his client, Wadhams *v.* Gay, 73 Ill. 415; People *v.* 1 Lamborn. Scam. (Ill.) 123; Edwards *v.* Edwards, 29 La. Ann. 597: nor waive right of inquisition, Hadden *v.* Clarke, 2 Grant's Cases, 107: nor direct levy of goods upon process, Welsh *v.* Cochrane, 63 N. Y. 181: nor begin supplementary proceedings in the name of a deceased plaintiff, for whom, in his lifetime, he recovered judgment, Amoré *v.* Lamothe, 5 Abb. N. C. 146: nor employ associate counsel, except in the absence of his client, Briggs *v.* Georgia, 10 Vt. 68: nor pledge his client's credit to counsel, by an express promise to pay his fees, Mostyn *v.* Mostyn, L. R. 5 Ch. 457; Kennedy *v.* Broun, 13 C. B. N. S. 677: nor make an agreement for the suspension of proceedings upon a judgment, Pendexter *v.* Vernon, 9 Humph. 84.

Authority to Compromise. — The question whether the authority to compromise a cause is among the ordinary powers of an attorney or counsel has given rise to much litigation in England. The objection that counsel have not this authority was made in Swinfen *v.* Swinfen. In this case the counsel for the plaintiff, Sir Frederick Thesiger, and the counsel for the defendant, Sir Alexander Cockburn, agreed to compromise the case on the terms that the plaintiff should give up the estate and receive an annuity. The counsel for the plain-

masters of ships, and partners. Of each of these a few words will be said in this place.[1]

tiff knew that his client, Mrs. Swinfen, was opposed to a compromise, but in her absence a memorandum of the terms was drawn up and made a rule of court, and a juror was withdrawn. The plaintiff having afterwards refused compliance with this rule of court, she was called upon to show cause why an attachment for contempt should not issue against her for disobedience. Swinfen *v.* Swinfen, 18 C. B. 485. Upon the argument of the rule for an attachment, Cresswell, J., in delivering his judgment, said: "It is said that the compromise which was entered into by the counsel for the respective parties at Stafford was without the authority or consent of Mrs. Swinfen, the plaintiff. I think the court cannot for a moment listen to an objection of that sort; and I am glad to find that there is abundant authority for our holding that the client is absolutely and conclusively bound by what the counsel on her behalf assented to. I think it would be most fatal to the due administration of justice, if we were to allow the authority of counsel to be thus questioned. And there is not any hardship or inconvenience in this; for if the client, or the attorney, has reason to think that the counsel is taking a course that will prejudice his interests, he may withdraw his brief, and so put an end to his authority to represent the client before the court. But if counsel, duly instructed, take upon himself to consent to a compromise which he, in the exercise of a sound discretion, judges to be for the interest of his client, the court will not inquire into the existence or extent of his authority. I am extremely happy to find that the decisions abundantly bear us out in thinking this objection cannot be permitted to prevail." But as there has been no demand on the plaintiff for performance, the rule to show cause was discharged. A bill was afterwards filed against Mrs. Swinfen, in chancery, praying that she might be decreed specifically to perform the agreement for compromise. The Master of the Rolls dismissed the bill for specific performance, upon the ground that, in making the compromise, the counsel for Mrs. Swinfen exceeded his authority, and that she was not bound by it. Swinfen *v.* Swinfen, 24 Beav. 549. Upon appeal it was held that "under the circumstances of this case," the agreement was not one which a court of equity would enforce. Swinfen *v.* Swinfen, 2 De G. & J. 381. In Chown *v.* Parrott *et al.*, 14 C. B. N. S. 74, it was held that attorneys who had made a compromise, by which judgment was rendered against the plaintiffs, and who had exercised due care and skill, and acted in a manner which they believed advantageous and beneficial to their clients, but without express authority to compromise the action, were not liable for damages. See Fray *v.* Voules, 1 El. & El. 839, and Prestwich *v.* Poley, 18 C. B. N. S. 806.

In Strauss *v.* Francis, L. R. 1 Q. B. 379, it was determined that counsel have

[1] Mr. Bell, in his Commentaries on the Laws of Scotland, has remarked, that "In mercantile agency there is a vast variety of forms, in which the authority of a principal is daily delegated to others. Besides the occasional authority, by procuratory, or procuration, to accept or draw bills of exchange, the charge given to a clerk to manage a store or shop, which is called Institorial power, the extensive trust given to a shipmaster, called Exercitatorial power, the powers of factors, agents, and brokers, are all included within the contract." 1 Bell, Comm. 385 (4th ed.); Id. p. 476 (5th ed.).

§ 27. First. AUCTIONEERS.[1] An auctioneer is a person, who is authorized to sell goods or merchandise at public auction or sale for a recompense, or (as it is commonly called) a commission. In two respects he differs from a mere broker. A broker may (as we shall presently see) buy, as well as sell;[2] whereas an auctioneer can only sell. So, a broker cannot sell personally at public auction; for that is the appropriate function of an auctioneer; but he may sell at private sale, which power an auctioneer (as such) does not possess.[3] An auctioneer is primarily deemed to be the agent of the seller of

the same authority to compromise as attorneys. The authority of counsel and attorneys to enter into a binding agreement for compromise was also asserted in Thomas *v.* Harris, 27 L. J. N. S. Ex. 353; *Re* Wood, *Ex parte* Wenham, 21 W. R. 104; Brady *v.* Curran, Ir. Rep. 2 C. L. 314; Berry *v.* Mullen, Ir. Rep. 5 Eq. 368.

The American decisions generally agree in this respect with those of the English courts. In some of the States, however, it has been held that an attorney has no implied authority to compromise a suit. This has been held in Vail *v.* Jackson, 15 Vt. 314; Smith *v.* Dixon, 3 Met. (Ky.) 438; Derwort *v.* Loomer, 21 Conn. 245; Stokeley *v.* Robinson, 34 Pa. St. 315; Huston *v.* Mitchel, 14 Serg. & R. 307; Pickett *v.* Merchants' Nat. Bank, 32 Ark. 346; Mandeville *v.* Reynolds, 68 N. Y. 528.

Holker *v.* Parker, 7 Cranch, 452, is often referred to as an authority in support of the position that an attorney has no implied power to compromise. It was there held that under the special circumstances of that case, an award of referees, founded upon an agreement of the attorneys, was not binding on the plaintiff. See Potter *v.* Parsons, 14 Iowa, 286. In Massachusetts, in a recent case (Wieland *v.* White, 109 Mass. 392), where the question was whether a plaintiff was bound by an agreement made by his attorney while the action was pending, that the plaintiff should have judgment by default, and that execution should not issue for a certain number of days thereafter, the court held the agreement binding. See Doon *v.* Donaher, 113 Mass. 151.

Change of Attorney. — As the authority of the attorney ceases with the determination of the cause, a party may sue out a writ of execution, scire facias, or error, by a different attorney, without giving notice of the change. Tipping *v.* Johnson, 2 B. & P. 357; Burr *v.* Atwood, 1 Salk. 89; Batchelor *v.* Ellis, 7 T. R. 337. But while the cause is pending, the court, for the protection of the attorney, will not permit a party to change his attorney without first paying his charges. Langley *v.* Stapleton, Barnes, 40; Witt *v.* Ames, 11 W. R. 751; 8 L. T. N. S. 425. Until notice of the change of attorney has been given to the opposite party, such party is entitled to treat the former attorney as still employed. Powel *v.* Little, 1 W. Bl. 8; Lewis *v.* Sumner, 13 Met. 269. — ED.]

[1] As to powers of Auctioneers, see post, §§ 107, 108.

[2] Post, § 28.

[3] Wilkes *v.* Ellis, 2 H. Bl. 555; Daniel *v.* Adams, Ambl. 495. Auctioneers were sometimes called Brokers in our old law. Spelman, in his Glossary, Auctionarii, defines them thus: Qui publicis subhastationibus præsunt, Propolæ, et quos, *Angli*, Brokers, dicimus. See also Jacob's Law Dict. *Brokers*.

the goods; but for certain purposes he is also deemed to be the agent of both parties.[1] Thus, by knocking down the goods sold to the person who is the highest bidder, and inserting his name in his book or memorandum, as such, he is considered as the agent of both parties; and the memorandum so made by him will bind both parties, as being a memorandum sufficiently signed by an agent of both parties within the statute of frauds. Before the knocking down of the goods, he is, indeed, exclusively the agent of the seller; but after the knocking down, he becomes also the agent of the purchaser, and the latter is presumed to give him authority to write down his name as purchaser.[2] An auctioneer has also a special property in the goods sold by him, and a lien on the same and the proceeds thereof, for his commissions; and he may sue the purchaser at the sale in his own name,[3] as well as in the name of his principal.[4] An auctioneer is also deemed personally a vendor to the purchaser at the sale, unless at the time of the sale he discloses the name of his principal, and the transaction is treated as being exclusively between the principal and the vendee.[5] An auctioneer can sell only for ready money, unless there be some usage of trade to sell on credit.[6]

§ 28. Secondly. BROKERS. The true definition of a broker

[1] See Johnson *v.* Roberts, 30 Eng. Law & Eq. 234.

[2] Post, § 108; Simon *v.* Motivos, 3 Burr. 1921; Emmerson *v.* Heelis, 2 Taunt. 38, 48; Keneys *v.* Proctor, 1 Jac. & Walk. 350; 3 Ves. & B. 57, 58; White *v.* Proctor, 4 Taunt. 209, 211; McComb *v.* Wright, 4 John. Ch. 659; Hinde *v.* Whitehouse, 7 East, 558, 569; Bird *v.* Boulter, 4 B. & Adolph. 443; Buckmaster *v.* Harrop, 13 Ves. 472, 473; Henderson *v.* Barnwall, 1 Y. & Jerv. 389; Fairbrother *v.* Simmons, 5 B. & Ald. 333. In Williams *v.* Millington (1 H. Bl. 85), Mr. Justice Heath said: "Though he (an auctioneer) is an agent to some purposes, he is not so to all. He is an agent for each party in different things; but not in the same thing. When he prescribes the rules of bidding, and the terms of the sale, he is the agent for the seller. But when he puts down the name of the buyer, he is agent for him only."

[3] Robinson *v.* Rutter, 30 Eng. Law & Eq. 401; 4 El. & Bl. 954. [He may sue for a deposit in his own name where the terms of sale contemplate the payment of a deposit into his hands by the buyer, Thompson *v.* Kelly, 101 Mass. 291: but where he was employed to sell goods by one not the owner, he cannot sue the purchaser if the rightful owner appears and claims them, Dickenson *v.* Naul, 4 B. & Ad. 638: nor can he sue, where the purchaser has settled with the owner, if his charges have been paid, Grice *v.* Kenrick, L. R. 5 Q. B 340. — ED.]

[4] Williams *v.* Millington, 1 H. Bl. 81, 84, 85; 3 Chitty on Com. & Manuf. 210; Girard *v.* Taggard, 5 Serg. & Rawle, 19, 27.

[5] Mills *v.* Hunt, 20 Wend. 431; Franklin *v.* Lamond, 4 Com. B. 637; Jones *v.* Littledale, 6 Ad. & Ell. 486; Post, §§ 160 *a*, 266, 269, 270.

[6] Post, §§ 108, 209.

seems to be, that he is an agent, employed to make bargains and contracts between other persons, in matters of trade, commerce or navigation, for a compensation, commonly called brokerage.[1] Or, to use the brief but expressive language of an eminent judge, "A broker is one, who makes a bargain for another, and receives a commission for so doing."[2] Properly speaking, a broker is a mere negotiator between the other parties, and he never acts in his own name, but in the names of those who employ him.[3] Where he is employed to buy or to sell goods, he is not intrusted with the custody or possession of them, and is not authorized to buy or to sell them in his own name.[4] He is strictly, therefore, a

[1] Com. Dig. *Merchant*, C. Terms de la Ley, *Broker;* Malyne, Lex Merc. 143; 1 Bell, Comm. 347, 385, 386 (4th ed.); Id. pp. 477, 478, 481, 483, (5th ed.); Wilkes *v.* Ellis, 2 H. Bl. 555; Jannen *v.* Green, 4 Burr. 2103; 2 Kent, Comm. Lect. 41, p. 622, note (*d*), (4th ed). Cowel, in his Interpreter, gives the etymology of the word from the French word Broceur, Tritor, a person who breaks into small pieces, as if to say, he is a dealer in small wares.

[2] In Pott *v.* Turner, 6 Bing. 702, 706, Lord Chief Justice Tindal said, "A broker is one who makes a bargain for another, and receives a commission for so doing; as, for instance, a stock-broker. But in common parlance one who receives payment of freights for the ship-owner, and negotiates for cargoes, is a broker." [But an agent who merely negotiates a personal contract for work and labor, is not a broker. The brokerage must relate to goods or money. Milford *v.* Hughes, 16 M. & W. 174. An agent into whose hands money is placed to be applied in a peculiar way has been lately held to be a broker, Cooke, *Ex parte*, *Re* Strachan, L. R. 4 Ch. Div. 123: and an officer of a company formed for the purpose of carrying on the business of stock-broking, who bought some stock for a customer, and signed bought-and-sold notes, is liable for a penalty for acting as a broker without a license, Scott *v.* Cousins, L. R. 4 C. P. 177. — Ed.]

[3] Baring *v.* Corrie, 2 B. & Ald. 137, 143, 148, 149. See also Kemble *v.* Atkins, 7 Taunt. 260; 2 Kent, Comm. Lect. 41, p. 622, note (*d*), (4th ed.); 1 Bell, Comm. pp. 346, 347, § 379 (4th ed.); Id. p. 385, § 409; Id. 477, 478, 481, 483 (5th ed.) Domat has given a very full and exact description according to the sense of our law. "The engagement (says he) of a broker is like to that of a proxy, a factor, and other agent; but with this difference, that, the broker being employed by persons who have opposite interests to manage, he is, as it were, agent both for the one and the other, to negotiate the commerce and affair in which he concerns himself. Thus, his engagement is twofold, and consists in being faithful to all the parties, in the execution of what every one of them intrusts him with. And his power is not to treat, but to explain the intentions of both parties, and to negotiate in such a manner, as to put those who employ him in a condition to treat together personally." 1 Domat, B. 1, tit. 17, § 1, art. 1. [A usage in the wool trade, that, when a broker is employed to buy wool, he may contract in his own name when the responsibility of his principal is objected to, without communicating the fact to his principal, was held a good usage in Cropper *v.* Cook, L. R. 3 C. P. 194. — G.]

[4] Baring *v.* Corrie, 2 B. & Ald. 137, 143, 148. As to his powers and

middle-man, or intermediate negotiator between the parties; and for some purposes (as for the purpose of signing a contract within the statute of frauds) he is treated as the agent of both parties.[1] Hence, when he is employed to buy and sell goods, he is accustomed to give to the buyer a note of the sale, commonly called a sold note, and to the seller a like note, commonly called a bought note, in his own name, as agent of each, and thereby they are respectively bound, if he has not exceeded his authority.[2] Hence also it is, that if a broker sells the goods of his principal in his own name (without some special authority so to do), inasmuch

duties, see post, §§ 107, 108. [But see Henry *v.* Phil. Warehouse Co., 81 Pa. St. 76.]

[1] Rucker *v.* Cammeyer, 1 Esp. 106; Hinde *v.* Whitehouse, 7 East, 558, 569; Kemble *v.* Atkins, 7 Taunt. 260; Henderson *v.* Barnwall, 1 Y. & Jerv. 387; Beal *v.* McKiernan, 6 Louis. 407; Post, §§ 107, 108; Hinckley *v.* Arey, 27 Me. 362.

[2] Ibid.; Hicks *v.* Hankin, 4 Esp. 114; Heyman *v.* Neale, 2 Camp. 337; Dickinson *v.* Lilwal, 1 Stark. 128; Gale *v.* Wells, 1 Carr. & Payne, 388; Cumming *v.* Roebuck, 1 Holt's N. P. 172; Grant *v.* Fletcher, 5 B. & Cressw. 436; Thornton *v.* Kemster, 5 Taunt. 786; 1 Bell, 347 (4th ed.); Id. pp. 477, 478 (5th ed.); Goom *v.* Aflalo, 6 B. & Cressw. 117. The name of both the buyer and the seller ought to appear upon the sale note given to the parties, though in practice the name of one party is sometimes omitted in the note given to him. Champion *v.* Plummer, 4 Bos. & Pull. 252; Picks *v.* Hankin, 4 Esp. 114, 115. I have given in the text the ordinary designation of the sale notes, as bought and sold notes. There is, however, some confusion in the books in the use of the terms, probably arising from the words of the instrument itself. Thus, in Baring *v.* Corrie (2 B. & Ald. 144), Lord Chief Justice Abbott, speaking of the buyers in that case, says, "that they received a *sale* note, and were not required to sign a *bought* note." In the same case, Mr. Justice Bayley says, "that the brokers delivered to the plaintiffs (the sellers) a *sold* note, exactly in the proper form, supposing them to have sold in their character as brokers; and they delivered to the defendants (the buyers) a *bought* note, exactly suited to the case of their having sold as brokers, without disclosing the name of the seller." See the distinction in Trueman *v.* Loder, 11 Adolph. & Ellis, 589; Higgins *v.* Senior, 8 Mees. & Wels. 834, 835. [In Heyman *v.* Neale, *supra*, it was held that the contract was really made by the entry in the broker's book, and that the bought-and-sold notes were only a copy of the entry. This decision has been supported by the case of Sievewright *v.* Archibald, 20 L. J. Q. B. 529. But Abbott, C. J., in Thornton *v.* Meux, Moody & M. 43, held that the notes bound the parties and not the entry in the broker's book; and in Townend *v.* Drakeford, 1 C. & K. 20, Denman, J., held that where there was a material difference between the bought-and-sold notes, there was no contract; and it seems that this is so, unless it is shown that the entry in the broker's book was known to both parties. Thornton *v.* Charles, 9 M. & W. 802. And where two parties agreed upon the terms of a contract, and employed a broker to draw it out, who omitted one of the stipulations agreed upon: *held*, that the contract was not binding upon either. Pitts *v.* Beckett, 13 M. & W. 743. — Ed.]

as he exceeds his proper authority, the principal will have the same rights and remedies against the purchaser, as if his name had been disclosed by the broker.[1]

§ 29. A broker, being personally confided in, cannot ordinarily delegate his authority to a sub-agent or clerk under him, or to any other person. His authority, therefore, to delegate it, if it exists at all, must arise from an express or an implied assent of the principal thereto.[2]

§ 30. Brokers were a class of persons well known in the civil law under the description of *proxenetæ*. Their functions, among the Romans, were not unlike those which are performed by them among all modern commercial nations; for in all these nations, they are a known, if not a necessary, order of agents.[3] "Sunt," says the Digest, "enim hujusmodi hominum, ut tam in magna civitate, officinæ. Est enim proxenetarum modus, qui emptionibus, venditionibus, commerciis, contractibus licitis utiles, non adeo improbabili more se exhibent."[4] They were entitled to charge a brokerage compensation; and were not treated as ordinarily incurring any personal liability by their intervention, unless there was some fraud on their part. "Proxenetica jure licito petuntur. Si proxeneta intervenit faciendi nominis, ut multi solent, videamus, an possit quasi mandator teneri? Et non puto teneri. Quia hic monstrat magis nomen, quam mandat, tametsi laudet nomen."[5]

§ 31. It has been already suggested that, a broker is for some purposes treated as the agent of both parties. But primarily he is deemed merely the agent of the party by whom he is originally employed; and he becomes the agent of the other party only when the bargain or contract is definitively settled, as to its terms, between the principals;[6] for, as a middle-man, he is not intrusted to fix the terms, but merely to interpret (as it is sometimes phrased) be-

[1] Baring *v.* Corrie, 2 B. & Ald. 137, 143–146; Saladin *v.* Mitchell, 45 Ill. 79.

[2] Henderson *v.* Barnwall, 1 Y. & Jerv. 387; Cochran *v.* Irlam, 2 M. & S. 301, note; Post, § 108.

[3] See 1 Domat, B. 1, tit. 17, Introd. and § 1, art. 1; Goom *v.* Aflalo, 6 B. & Cressw. 117; Henderson *v.* Barnwall, 1 Y. & Jerv. 387, 393, 394; Beawes, Lex Merc. *Brokers*, Vol. 1, p. 464 (6th ed.).

[4] Dig. Lib. 50, tit. 14, l. 3; 1 Domat, B. 1, tit. 17, § 1, art. 1.

[5] Dig. Lib. 50, tit. 14, l. 1, 2; 1 Domat, B. 1, tit. 17, § 1, art. 2.

[6] Kirmits *v.* Surry, Paley on Agency, by Lloyd, 171, note (*p*); Henderson *v.* Barnwall, 1 Y. & Jerv. 387, 393, 399; Hinckley *v.* Arey, 27 Me. 362.

tween the principals.[1] It would be a fraud in a broker to act for both parties, concealing his agency for one from the other, in a case where he was intrusted by both with a discretion, as to buying and selling, and of course where his judgment was relied on. Thus, if A should employ a broker to sell goods for him for the highest price he could get, and his judgment should be confided in; and B should at the same time employ the same broker to purchase the like goods at the lowest price, for which they could be obtained; it is plain, that, if this mutual agency were concealed, it might operate as a complete surprise upon the confidence of both parties, and would thus be a fraud upon them. Indeed, it would be utterly incompatible with the duties of the broker to act for both under such circumstances; since, for all real purposes, he would be both buyer and seller; and the law will not tolerate any man in becoming both buyer and seller, where the interests of third persons are concerned.[2]

[1] Dig. Lib. 50, tit. 14, l. 1, 2; 1 Domat, B. 1, tit. 17, § 1, art. 1.

[2] See Wright *v.* Dannah, 2 Camp. 203; Fairbrother *v.* Simmons, 5 B. & Ald. 333. [But a broker who is employed by both parties in a negotiation for the exchange of real-estate, and both parties know that he is so employed, and agree to pay him his commissions, can recover them from both. Rowe *v.* Stevens, 53 N. Y. 621. And real-estate brokers, merely employed as middlemen to bring purchasers together to enable them to make their own bargain, are not agents to buy and sell, and may charge commissions to both parties. Siegel *v.* Gould, 7 Lans. 177; Fritz *v.* Finnerty, 14 Am. Law Rev. 598. But the general rule seems to be well established, that a broker who acts for both parties in effecting an exchange or sale of property can recover compensation from neither, unless his double employment was known and assented to by both. Rice *v.* Wood, 113 Mass. 133; Pugsley *v.* Murray, 4 E. D. Smith, 245; Scribner *v.* Collar, 40 Mich. 375. And evidence of a custom among brokers to charge commissions in such cases is incompetent. Raisin *v.* Clark, 41 Md. 158; Farnsworth *v.* Hemmer, 1 Allen, 494. In this case, Bigelow, C. J., said: "The principle on which rests the well-settled doctrine, that a man cannot become the purchaser of property for his own use and benefit which is intrusted to him to sell, is equally applicable when the same person, without the authority or consent of the parties interested, undertakes to act as the agent of both vendor and purchaser. The law does not allow a man to assume relations so essentially inconsistent and repugnant to each other. The duty of an agent for a vendor is to sell the property at the highest price; of the agent of the purchaser, to buy it for the lowest. These duties are so utterly irreconcilable and conflicting that they cannot be performed by the same person, without great danger that the rights of one principal will be sacrificed to promote the interests of the other, or that neither of them will enjoy the benefit of a discreet and faithful exercise of the trust reposed in the agent. As it cannot be supposed that a vendor and purchaser would employ the same person to act as their agent to buy and sell the same property, it is clear that it operates as a surprise on both parties, and is a breach of the trust and confi-

§ 32. There are various sorts of brokers now employed in commercial affairs, whose transactions form or may form a distinct and independent business. Thus, for example, there are exchange and money brokers, stock brokers, ship brokers, merchandise brokers, and insurance brokers, who are respectively employed in buying and selling bills of exchange, or promissory notes, or goods, or stocks, or ships and cargoes; or in procuring insurance and settling losses, or in procuring freights or charter-parties.[1]

§ 32 *a*. The character of a broker is also sometimes combined in the same person with that of a factor.[2] In such cases we should carefully distinguish between his acts in the one character and in the other; as the same rules do not always precisely apply to each. There is nothing in our law to prevent a broker from becoming also a factor in the same transaction, if he chooses to undertake the mixed character. It is not commonly the duty of a broker, unless there are words importing that he is to perform such a duty, to see

dence intended to be reposed in the agent by them respectively, if his intent to act as agent of both in the same transaction is concealed from them. It is of the essence of his contract that he will use his best skill and judgment to promote the interest of his employer. This he cannot do, where he acts for two persons whose interests are essentially adverse. He is therefore guilty of a breach of his contract. Nor is this all. He commits a fraud on his principals in undertaking, without their assent or knowledge, to act as their mutual agent, because he conceals from them an essential fact, entirely within his own knowledge, which he was bound in the exercise of good faith to disclose to them. Story on Agency, § 31; Copeland *v*. Mercantile Ins. Co., 6 Pick. 198, 204; Rupp *v*. Sampson, 16 Gray, 398.

"Such being the well-settled rule of law, it follows that the evidence offered by the plaintiff was inadmissible. A custom or usage, to be legal and valid, must be reasonable and consistent with good morals and sound policy, so that parties may be supposed to have made their contracts with reference to it. If such a usage is shown to exist, then it becomes the law by which the rights of the parties are to be regulated and governed. But the usage on which the plaintiff relied was wanting in these essential elements. It would be unreasonable, because, if established, it would operate to prevent the faithful fulfilment of the contract of agency. It would be contrary to good morals and sound policy, because it would tend to sanction an unwarrantable concealment of facts essential to a contract, and operate as a fraud on parties who had a right to rely on the confidence reposed in their agents." And see Walker *v*. Osgood, 98 Mass. 348; Salomons *v*. Pender, 3 H. & C. 639; Kerfoot *v*. Hyman, 52 Ill. 512; Parker *v*. Vose, 45 Me. 54; Mollett *v*. Robinson, L. R. 5 C. P. 646, 655; Everhart *v*. Searle, 71 Penn. St. 256; Carman *v*. Beach, 63 N. Y. 97. — Ed.]

[1] See Beawes, Lex Merc. Vol. 1, pp. 465–467 (6th ed.); 1 Bell, Comm. 385, 386 (4th ed.); Id. pp. 477, 478, 481, 483 (5th ed.); Malyne, Lex Merc. 85, 91.

[2] 1 Bell, Comm. B. 3, Pt. 1, ch. 4, art. 409, p. 386 (4th ed.); Id. pp. 477, 478 (5th ed.).

to the delivery of the goods on the payment of the price. But it may be the duty of a broker, under the employment he has undertaken, to see to the delivery of the goods and the payment of the price.[1]

§ 33. Thirdly. FACTORS. A factor is commonly said to be an agent employed to sell goods or merchandise, consigned or delivered to him by or for his principal, for a compensation, commonly called factorage or commission.[2] Hence he is often called a commission-merchant or consignee; the goods received by him for sale are called a consignment;[3] and when, for an additional compensation in case of sale, he undertakes to guarantee to his principal the payment of the debt due by the buyer, he is said to receive a *del credere*

[1] Brown *v.* Boorman, 11 Clarke & Fin. 1-44.

[2] Com. Dig. *Merchant*, B.: Mal. Lex Merc. 81; Beawes, Lex Merc. *Factors*, Vol. 1, p. 44 (6th ed.); 3 Chitty on Com. & Manuf. 193; 1 Domat, B. 1, tit. 17, Introd.; 2 Kent, Comm. Lect. 41, p. 622, note (*d*), (4th ed.); 1 Bell, Comm. 385, §§ 408, 409 (4th ed.); Id. pp. 477, 478 (5th ed.); Post, §§ 110-114. In Baring *v.* Corrie, 2 B. & Ald. 143, Lord Chief Justice Abbott defines a factor thus: "A factor is a person, to whom goods are consigned for sale, by a merchant residing abroad, or at a distance from the place of sale." This is a correct definition, as to some sorts of factors. But a factor may be to buy, as well as to sell; and he may reside in the same place with his principal as well as at a distance. 1 Bell, Comm. 385, § 409; Id. 386, § 410 (4th ed.); Id. pp. 477, 478 (5th ed.). [In Whitfield *v.* Brand, 16 M. & W. 282, Pollock, C. B., says: "As soon as it appears to be a branch of a person's business to sell the goods of others on commission, that establishes him to be a factor." And the distinction between a *del credere* agent and a vendee is well defined by Mellish, J., in the case of *Ex parte* White, *Re* Nevill, L. R. 6 Ch. 397. He says, "A consignee who is at liberty to sell at any price he likes and receive payment at any time he likes, but is bound, if he sells the goods, to pay consignor for them at a fixed price and time, is not a *del credere* agent." But the mere fact that advances have been made by a factor does not have the effect of altering the revocable nature of his authority. De Comas *v.* Prost, 3 Moo. P. C. N. S. 158. The American law seems to be somewhat different however, and it has been held that the principal, after advances have been made by the factor, cannot control or suspend his right of sale, except so far as concerns the surplus of the goods above the amount required to reimburse the factor for the advances. Bell *v.* Hannah, 3 Bax. (Tenn.) 47; Mooney *v.* Musser, 45 Ind. 115; Howard *v.* Smith, 56 Mo. 314; Nelson *v.* Chicago R. R. Co., 2 Ill. App. 180. — ED.]

[3] 1 Bell, Comm. 212; Id. 385, §§ 408, 459; Id. 386, § 410; Id. pp. 477, 478 (5th ed.). The description here given of a factor answers precisely to that of a commission merchant or consignee for sale. But it has been well observed, that there are different sorts of consignees; some have a power to sell, manage, and dispose of the property, subject only to the rights of the consignor. Others have a mere naked right to take possession. Per Lord Eldon, in Lucena *v.* Crawford, 4 Bos. & Pull. 324; De Forest *v.* Fulton Ins. Co., 1 Hall, Rep. 84; Post, §§ 112, 215, 328.

commission.[1] The phrase *del credere* is borrowed from the Italian language, in which its signification is exactly equivalent to our word, guaranty, or warranty.[2] A factor is called a home factor, when he resides in the same state or country with his principal; and he is called a foreign factor, when he resides in a different state or country.[3] Sometimes, in voyages abroad, an agent accompanies the cargo, to whom it is consigned for sale; and who is to purchase a return cargo out of the proceeds. In such cases the agent is properly a factor, and is usually called a supercargo.[4] A factor may now ordinarily sell goods on credit, in all cases where there is no usage to the contrary.[5]

§ 34. A factor differs from a broker in some important particulars. A factor may buy and sell in his own name, as well as in the name of his principal. A broker (as we have seen) is always bound to buy and sell in the name of his principal.[6] A factor is intrusted

[1] 3 Chitty on Com. & Manuf. 193, 194; Grove *v.* Dubois, 1 T. R. 112; 1 Bell, Comm. 289, § 313; Id. 387, § 411 (4th ed.); Id. pp. 477, 478 (5th ed.); Morris *v.* Cleasby, 4 M. & Selw. 576. It was laid down in Grove *v.* Dubois, 1 T. R. 112, 113, that a commission del credere amounts to an absolute engagement to the principal from the factor, and makes him liable in the first instance. But the doctrine of that case on this point seems incorrect. A factor, with a del credere commission, is liable to the principal, if the buyer fails to pay, or is incapable of paying. But he is not primarily the debtor. On the contrary, the principal may sue the buyer in his own name, notwithstanding the del credere commission; so that the latter amounts to no more than a guaranty. See Gale *v.* Comber, 7 Taunt. 558; Peele *v.* Northcote, 7 Taunt. 478; Morris *v.* Cleasby, 4 M. & Selw. 566, 574, 575; Thompson *v.* Perkins, 3 Mason, 232; 2 Kent, Comm. Lect. 41, pp. 624, 625, note (*e*), (4th ed.); Holbrook *v.* Wight, 24 Wend. 169.

[2] Ibid.

[3] 3 Chitty on Com. & Manuf. 193, 194; 1 Beawes, Lex Merc. 44 (6th ed.); 1 Bell, Comm. 385, 386, §§ 408, 409 (4th ed.); Id. pp. 475, 478 (5th ed.); Ersk. Inst. B. 3, tit. 3, § 34.

[4] 1 Beawes, Lex Merc. 44, 47 (6th ed.); 1 Bell, Comm. 385 (4th ed.); Id. pp. 477, 478 (5th ed.); 1 Domat, B. 1, tit. 16, § 3, art. 2. Beawes gives the following description of them: "Supercargoes are persons employed by commercial companies, or private merchants, to take charge of the cargoes they export to foreign countries, to sell them there to the best advantage, and to purchase proper commodities to relade the ships on their return home. For this reason, supercargoes generally go out and return home with the ships on board of which they were embarked, and therein differ from factors, who reside abroad, at the settlements of the public companies, for whom they act." 1 Beawes, Lex Merc. 47 (6th ed.).

[5] Post, §§ 60. 110, 209.

[6] Ante, §§ 28, 31; Baring *v.* Corrie, 2 B. & Ald. 143, 147, 148; 3 Chitty on Com. & Manuf. 193; Id. 210, 211, 241; 1 Bell, Comm. 212; Id. 385, 386, §§ 408–410 (4th ed.); Id. pp. 455, 478 (5th ed.); 3 Kent, Comm. Lect. 41, p. 622, note (*d*), (4th ed.); 1 Domat, B. 1, tit. 17, § 1, art. 1.

with the possession, management, control, and disposal of the goods, to be bought or sold, and has a special property in them, and a lien on them.[1] A broker, on the contrary, usually has no such possession, management, control, or disposal of the goods, and consequently has no such special property or lien.[2]

§ 34 *a*. A factor has not, any more than a broker, a power to delegate his authority to another person, unless it is conferred by the usages of trade, or by the assent of his principal, express or implied. And this also was a rule adopted to some extent, in the

[1] Post, §§ 111, 112, 374; Holbrook *v.* Wight, 24 Wend. 169; Bryce *v.* Brooks, 26 Wend. 367; Post, § 384; Jordan *v.* James, 5 Hamm. (Ohio) 99; Marfield *v.* Douglas, 1 Sandford, Sup. Ct. 360.

[2] Ibid.; 1 Bell, Comm. 385, 386, §§ 408-410 (4th ed.); Id. pp. 477, 478 (5th ed.). When a broker is intrusted with negotiable securities, indorsed in blank, for sale, he becomes rather a factor than a broker; for he is then intrusted with the disposal and control of them, and may, by his negotiation of them, pass a good title to them. Indeed, in practical business, the two characters are often confounded, and a broker is often a factor and a merchant, as well as a general agent. Pickering *v.* Busk, 15 East, 38, 43; Ante, §§ 32, 33, note 4. When a broker becomes possessed of the thing, about which he is employed, he acquires equally with a factor a lien for his commissions; as, for example, an insurance broker, having possession of a policy. 3 Chitty on Com. & Manuf. 210, 211, 541; Blunt, Commercial Dig. ch. 15, p. 230. Mr. Bell has remarked, that "Sometimes agents or factors act as the ostensible vendors of property belonging to merchants residents in the same place, having warehouses and places fit for exhibiting the goods for sale. Sometimes they act as factors both for buyer and seller; the sale being perfected, and the delivery transferred, by delivery of the bills for the price, and an entry in the factor's books to the debit of the one party and the credit of the other. The character of factor and broker is frequently combined; the broker having possession of what he is employed to sell, or being empowered to obtain possession of what he is employed to purchase. Properly speaking, in these cases, he is a factor." 1 Bell, Comm. 386, § 409 (4th ed.); Id. p. 478 (5th ed.). [Thus, where a broker has obtained a loan for his principal, and holds certain chattels as security therefor, he cannot appropriate the proceeds of said chattels to the payment of a debt due to him by the principal, James's Appeal, 89 Pa. St. 54: nor retain the freight under a charter-party for the same purpose, Walshe *v.* Provan, 8 Exch. 843. But where a stock broker agrees to purchase and carry stock for his customer upon a margin, he can sell the stock and reimburse himself, unless the margin is kept good, upon notice. White *v.* Smith, 54 N. Y. 522; Baker *v.* Drake, 66 N. Y. 518; Corbett *v.* Underwood, 83 Ill. 324. And where bonds were deposited with bankers, who fraudulently deposited them with brokers to raise money on them, *held*, that the brokers had a lien upon them for all the money advanced by them to the bankers, and not merely for advances on these particular bonds. Jones *v.* Peppercorne, 28 L. J. Ch. 153. And where merchants imported a cargo of sugar, which was sold by brokers who retained out of the proceeds which passed through their hands their entire debt against the merchants, and the merchants failed, it was held in a suit by their assignee that the brokers could only retain their brokerage in this special sale, and had no general lien. Barry *v.* Boninger, 46 Md. 59. — Ed.]

civil law, in relation to some classes of agents, such as clerks in warehouses and shops (*institores*); for although the master of a ship was permitted, for the benefit of trade, to substitute another person as master, the same rule did not apply to mere institorial agents.[1] "Quippe res patitur, ut de conditione quis institoris dispiciat, et sic contrahat. In navis magistro non ita, nam interdum locus, tempus, non patitur plenius deliberandi consilium." [2]

§ 35. Fourthly. SHIPS'-HUSBANDS. A ship's-husband is a common expressive maritime phrase, to denote a peculiar sort of agency, created and delegated by the owner of a ship, in regard to the repairs, equipment, management, and other concerns of the ship.[3] A ship's-husband is sometimes appointed merely for the purpose of conducting the ordinary and necessary concerns of the ship on her return to her proper home port; such as making the proper entries at the custom-house; superintending the landing of the cargo; procuring the proper surveys of damage; settling the freight; and other incidents connected with the discharge of the cargo, and the termination of the voyage. But, generally, the person, designated as ship's husband, has a much larger authority, and is understood to be the general agent of the owners, in regard to all the affairs of the ship in the home port.[4] As such general agent, he is intrusted with authority to direct all proper repairs and equipments, and outfits for the ship; to hire the officers and crew; to enter into contracts for the freight or charter of the ship, if that is her usual employment; and to do all other acts necessary and proper to dispatch her for and on her intended voyage.[5] But his authority does not

[1] Ante, § 13; Catlin *v.* Ball, 4 Camp. 183; Bromley *v.* Coxwell, 2 Bos. & Pull. 438; Cochran *v.* Irlam, 2 M. & Selw. 301, n.; Soley *v.* Rathbone, 2 M. & Selw. 298 a; Dig. Lib. 14, tit. 1, l. 1; Pothier, Pand. Lib. 14, tit. 1 n. 2, 3; 1 Domat, B. 1, tit. 16, § 3, art. 3. Domat, after stating the right of the master to delegate his authority, adds, as his interpretation of the text of the Digest: "But this rule is not to be extended indifferently to factors and others, set over any commerce or business at land, where the necessity of treating with them is not the same, and where it is easier to learn who is the person employed as factor, and how far his power extends." 1 Domat, B. 1, tit. 16, § 3, art. 3, Strahan's translation. In the civil law, the word institor was sometimes used for agent generally. Cuicunque igitur negotio præpositus sit Institor recte appellabitur. Dig. Lib. 14, tit. 3, l. 5, Prelim.; Pothier, Pand. Lib. 14, tit. 3, n. 5; Post, § 110. [2] Dig. Lib. 14, tit. 1, l. 1, Prelim.

[3] Abbott on Shipp. Pt. 1, ch. 3, § 2, p. 69 (ed. 1829); 1 Bell, Comm. §§ 426, 428, p. 410 (4th ed.); Id. pp. 503, 504 (5th ed.); Story on Partnership, § 418; Gillespie *v.* Winberg, 4 Daly (N. Y.), 318.

[4] See Abbott on Shipp. Pt. 1, ch. 3, § 2, p. 69 (ed. 1829); 1 Bell, Comm. §§ 426–429, pp. 410, 411 (4th ed.); Id. pp. 503, 504 (5th ed.).

[5] 1 Bell, Comm. §§ 426, 427, 428, pp. 410, 411 (4th ed.); Id. pp. 503, 504

extend to the procuring of any policy of insurance on the ship, either in port, or for the voyage, without some express or implied assent of the owner.[1]

(5th ed.); 2 Kent, Comm. Lect. 45, p. 157 (4th ed.); 1 Liverm. on Agency, 72, 73 (ed. 1818).

[1] French *v.* Backhouse, 5 Burr. 2727; Abbott on Shipp. Pt. 1, ch. 3, pp. 78–80; Marsh. on Ins. B. 1, ch. 8, § 2; Beawes (Lex Merc. 47, 6th ed.) has the following description of the powers and duties of ships'-husbands: "Ships'-husbands (says he), a class of agents so called, whose chief employment in capital seaport towns, particularly in the port of London, is, to purchase the ship's stores for the voyage; to procure cargoes on freight; to settle the terms and obtain policies of insurance; to receive the amount of the freight both at home and abroad; to pay the captain or master his salary, and disbursements for the ship's use; and, finally, to make out an account for all these transactions for his employers, the owners of ships, to whom he is, as it were, a steward at land, as the officer bearing that name is, on board, when the ship is at sea." Mr. Bell gives the following description of their duties: "The duties of the ship's-husband are: 1. To see to the proper outfit of the vessel in the repairs adequate to the voyage, and in the tackle and furniture necessary for a sea-worthy ship. 2. To have a proper master, mate, and crew for the ship, so that in this respect it shall be sea-worthy. 3. To see to the due furnishing of provisions and stores, according to the necessities of the voyage. 4. To see to the regularity of all the clearances from the custom-house, and the regularity of the registry. 5. To settle the contracts, and provide for the payment of the furnishings, which are requisite in the performance of those duties. 6. To enter into proper charter-parties, or engage the vessel for general freight, under the usual conditions; and to settle for freight, and adjust averages with the merchant; and 7. To preserve the proper certificates, surveys, and documents, in case of future disputes with insurers or freighters, and to keep regular books of the ship." 1 Bell, Comm. 410, § 428 (4th ed.); Id. p. 504 (5th ed.). He then adds, "His powers, where not expressly limited, may be described generally as those requisite to the performance of the duties now enumerated. It may be observed, however, 1. That, without special powers, he cannot borrow money generally for the use of the ship; though he may settle the accounts of the creditors for furnishings, or grant bills for them, which will form debts against the concern, whether he has funds in his hands or not, with which he might have paid them. 2. That, although he may, in the general case, levy the freight, which is, by the bill of lading, payable on the delivery of the goods, it would seem, that he will not have power to take bills for the freight, and give up the possession and lien over the cargo, unless it has been so settled by charter-party, or unless he has special authority to give such indulgence. 3. That, under general authority as ship's-husband, he has no power to insure or to bind the owners for premiums; this requiring a special authority. 4. That, as the power of the master to enter into contracts of affreightment is superseded in the port of the owners, so is it by the presence of the ship's-husband, or the knowledge of the contracting parties that a ship's-husband has been appointed." 1 Bell, Comm. 411, § 429 (4th ed.); Id. pp. 504, 505 (5th ed.). [The ship's-husband is bound to select tradesmen and appoint officers without showing partiality. Card *v.* Hope, 2 B. & C. 661. He must also account to the owners; and if he refuses or delays to do so, he will be liable to pay interest for moneys in his hands. Pearse *v.* Green, 1 J. & W. 135. — Ed.].

§ 36. Fifthly. MASTERS OF SHIPS. This is a well-known class of agents, possessing what some foreign jurists have called the exercitorial power, in relation to the equipment, outfit, repair, management, navigation, and usual employment of the ship committed to their charge.[1] The master of a ship is not, indeed, as the language of these jurists might at first sight be thought to imply, for all purposes to be deemed exercitor navis; for that description properly applies only to the absolute owner, or to him who is the hirer or employer of the whole ship for the voyage, by a contract with the owner (dominus navis), or his agent, the master.[2] The master of the ship in our law answers exactly to the description of the "magister navis" of the civil law. "Magistrum navis accipere debemus cui totius navis cura mandata est. Magistrum autem accipimus, non solum, quem exercitor præposuit, sed et eum quem magister."[3] And the master of the ship, by our law, as well as by the Roman law, possesses this power of appointing another person, as master, in his stead, and of delegating his authority, as master, to him, not indeed in all cases, nor in all places; but in cases of necessity, or sudden emergency in a foreign port, in the absence of the owner or employer or of his authorized agent, whenever it may be necessary and proper for the welfare of the ship, and the due accomplishment of the voyage.[4] Sometimes the master is also appointed supercargo, or

[1] Abbott on Shipp. Pt. 2, ch. 1, § 1; Id. ch. 2, §§ 1, 2, 4, 5, pp. 90–93 (ed. 1829); 1 Bell, Comm. 385, § 409; Id. pp. 505, 506 (5th ed.).

[2] Dig. Lib. 14, tit. 1, l. 1; Dig. Lib. 4, l. 9, §§ 1, 2; 1 Domat, B. 1, tit. 16, § 2, art. 1–4; Abbott on Shipp. Pt. 2, ch. 2, § 3, and note (*g*), (ed. 1829). Exercitorem autem eum dicimus, ad quem obventiones et reditus omnes perveniunt, sive is dominus navis sit, sive a domino navem per aversionem conduxit, vel ad tempus, vel in perpetuum. Dig. Lib. 14, tit. 1, l. 1, § 15; Pothier, Pand. Lib. 14, tit. 1, n. 1. The words per aversionem conduxit, in this passage, mean a hiring of the whole ship. See Pothier, ubi supra, note (1). In the foreign laws, and especially in the early maritime Ordinances, the master of the ship is often designated as the patron of the ship. He is generally so called in the Consolato del Mare. See also 1 Bell, Comm. B. 3, Pt. 1, ch. 5, §§ 1, 432, p. 412 (4th ed.); Id. pp. 505, 506 (5th ed.); 1 Stair, Inst. by Brodie, B. 2, tit. 12, §§ 18, 19; Post, §§ 117–123, 294, 295, 315.

[3] Dig. Lib. 14, tit. 1, l. 1, §§ 1, 5; Pothier, Pand. Lib. 14, tit. 1, n. 1; Abbott on Shipp. Pt. 2, ch. 2, § 3, note (*g*), pp. 91, 92 (ed. 1829); 1 Domat, B. 1, tit. 16, § 3, art. 3; 3 Kent, Comm. Lect. 46, pp. 160, 161 (4th ed.).

[4] See 1 Domat, B. 1, tit. 16, § 3, art. 3; 1 Bell, Comm. (4th ed.) B. 3, ch. 5, §§ 1, 433, p. 413 (4th ed.); Id. pp. 505–508 (5th ed.); Pothier, Traité de Chart. Part. n. 48, 49. The Digest lays down the rule, that the owner or employer is bound by the act of substitution, notwithstanding he has privately prohibited the master from doing the act. Quid tamen, si sic magistrum præposuit, ne alium ei licerit præponere? An adhuc Juliani Sententiam admittimus, videndum est. Finge, enim et nominatim eum prohibuisse, ne Titio

consignee of the cargo, in which case the rights and duties of the latter character are superadded to his ordinary rights and duties as master. But his acts as master, are at the same time to be treated as distinct from those, as supercargo, as if the acts, appropriate to each character, were confided to different persons.[1] Upon this subject we shall again touch hereafter.[2] But the full consideration of the rights, powers, and duties of masters of ships appropriately belongs to the law of shipping and navigation.

§ 37. Sixthly. PARTNERS. Partners are mutual agents of each other in all things which respect the partnership business. And, accordingly, we find that generally the act of any one, in the name of all, or for the benefit of all, in their common business, is deemed obligatory upon all the partners.[3] But, here again, it may be remarked, that the proper consideration of this subject belongs to the law of partnership; and it may, for the present, be passed over, as it will occur in another connection hereafter. However, the rules applicable to it will be found in most, if not in all respects, to be the same as those which govern in relation to other cases of general agency.[4]

magistro utaris. Dicendum tamen erit, eo usque producendam utilitatem navigantium. Dig. Lib. 14, tit. 1, l. 1, § 5; Pothier, Pand. Lib. 14, tit. 1, n. 3. Pothier on Charter-Parties lays down the same rule. See the excellent translation by Mr. Cushing of Pothier on Marit. Contr. p. 28, n. 49, and the note of the learned editor, id. 142, note 17, who cites Kuricke to the same effect. Roccus also asserts the same doctrine. See Ingersoll's Roccus, on Ships and Freight, note 4, p. 18; 1 Domat, B. 1, tit. 16, § 3, art. 3; 1 Bell, Comm. p. 413, § 434 (4th ed.); Id. pp. 505–508 (8th ed.). We have already seen (Ante, § 34, and note) that a broad distinction is taken between the right of the master of a ship to delegate his authority, and certain other classes of agents, such as Institores and Factors.

[1] Abbott on Shipp. by Story, Pt. 2, ch. 4, § 1 b, note (1), p. 134 (ed. 1829); Kendrick *v.* Delafield, 2 Caines, 67; Earle *v.* Rowcroft, 8 East, 126, 140; Cook *v.* Commerc. Ins. Co. 11 John. 40; Crousillat *v.* Ball, 4 Dall. 294; The Vrou Judith, 1 Rob. 150; The St. Nicholas, 1 Wheat. 417 (ed. 1818); 1 Bell, Comm. (4th ed.) B. 3, Pt. 1, ch. 5, § 433, p. 413; Id. p. 506 (5th ed.); 3 Kent, Comm. Lect. 46, pp. 159–164 (4th ed.); 1 Domat, B. 1, tit. 16, § 3, art. 3; Williams *v.* Nichols, 13 Wend. 58.

[2] Post, §§ 116–123, 294–300, 497.

[3] The same rule was applied in the civil law. Si plures navem exerceant, cum quolibet eorum in solidum agi potest. Ne in plures adversarios distringatur, qui cum uno contraxerit. Dig. Lib. 14, tit. 1, l. 1, § 25; Id. l. 2; 1 Domat, B. 1, tit. 16, § 3, arts. 6, 7; Pothier, Pand. Lib. 14, tit. 1, n. 10; Baring *v.* Lyman, 1 Story, 396.

[4] See Gow on Partn. ch. 2, § 2, pp. 53–91 (ed. 1825); Collyer on Partn. B. 2, ch. 2, § 1, p. 104; Id. B. 3, ch. 1, §§ 1–5, pp. 211–240; 3 Kent, Comm. Lect. 43, p. 40 (4th ed.); Story on Partn. §§ 101–125; Post, 124, 125.

CHAPTER IV.

JOINT PRINCIPALS AND JOINT AGENTS.

§ 38. LET us, in the next place, proceed to the consideration of cases, where there are two or more principals and two or more agents.[1] (1.) In regard to cases of two or more principals, it may be generally laid down, that if they have a several and distinct interest, no one of them can ordinarily appoint an agent for all the others, without the assent and concurrence of all of them. Thus, for example, if two persons, by a joint instrument, should consign two parcels of goods to a consignee for sale, the one being the owner of one parcel, and the other the owner of the other parcel; in such a case, no joint interest, or joint agency, would be created; but the consignee would become the several factor of each owner; and of course the owner of one parcel could not give instructions to the consignee, which would bind both, unless by the express or implied consent of the other.[2] But this is true only upon the supposition

[1] [Where a voluntary association of persons adopted by-laws, chose officers and directors, and organized themselves like a corporation, and authorized the directors to borrow money, and by the directors' authority the treasurer gave a promissory note for the money, and signed it "A. B. Treasr," it was held that all the members of the association were liable on the note. Walker *v.* Waitt, 50 Vt. 668. So where railroad corporations do business together, sharing profits and sending freight through on one or more combined lines, at their pleasure, and have a common office under the charge of a general agent, they are jointly liable on a contract made by a shipper of goods with such general agent. Barrett *v.* Ind. & St. Louis R. R. Co., 14 Am. Law Rev. 602. In such a case, one of the principals can sue another principal to recover money belonging to him, paid by the agent to the wrong party. Hathaway *v.* Cincinnatus, 62 N. Y. 434. See also Wood *v.* The Duke of Argyle, 6 M. & G. 928. — ED.]

[2] See Hoar *v.* Dawes, Doug. 371; Coope *v.* Eyre, 1 H. Bl. 37; United Ins. Co. *v.* Scott, 1 John. 106. In many cases where a factor becomes the agent of different owners, and upon the sales made by him there is a loss, it will be apportioned among them all. Some cases to this effect are stated in Malyne, Lex Merc. 80, 81; Molloy, de Jure Marit. B. 3, ch. 8, § 4; Corlies *v.* Cumming, 7 Cowen, 154; Post, § 179, note.

that the consignee knows the facts; for otherwise, he is at liberty to treat it as a joint consignment for the benefit of both; and then the instructions of either will, like the instructions of a partner, be binding upon the other; and both will become jointly liable to him for his commissions and disbursements.[1]

§ 39. Upon the same ground, where different persons have separate and distinct, although undivided, interests in the same personal property, one of them cannot appoint an agent for all. Thus, for example, one tenant in common of a chattel cannot appoint an agent for both, to sell the property.[2] The same doctrine is equally true with regard to joint tenants of a chattel.[3] But in cases of partnership the rule is different; for, as has been already intimated, each partner is treated, as to the partnership business, as the agent of all, and capable of binding all.[4] And each partner has an implied authority, at least in cases where the business is ordinarily done through the instrumentality of agents, to appoint an agent for the firm. Thus, one partner may consign a cargo to an agent or factor, for sales and returns; and his letter of consignment and instructions will bind the firm in that respect, although his partners may be ignorant of his acts. This expansion of the principle of the delegation of a partner's authority seems indispensable to the security and facility of commercial operations.[5]

§ 40. In cases of part-owners of ships, there is some peculiarity in the law, growing out of the necessary adaptations of it to the exigencies and conveniences of commerce. Part-owners of ships are tenants in common, holding distinct but undivided interests; and

[1] See 1 Domat, B. 1, tit. 15, § 2, art. 5.

[2] See Abbott on Shipp. Pt. 1, ch. 3, §§ 2–7, pp. 68–76.

[3] See Com. Dig. *Estates*, K. 1, 6. [But an authorized order to sell, given by one joint owner, may be ratified by the other owner by the latter's joining in a power of attorney, enabling the agent to convey their respective shares. Keay *v.* Fenwick, L. R. 1 C. P. D. 745. Where a number of persons constitute a common agent for a common purpose, no one of them has a right to compel the agent to render a separate account to himself, Louisiana Trustees *v.* Dupuy, 31 La. Ann. 305: but where one of two tenants in common, representing himself as the agent of the other, sells the land owned by both, the purchaser's title will only attach to the interest of the tenant with whom he deals, Sewell *v.* Holland, 61 Ga. 608. See also Cunningham *v.* Washburn, 119 Mass. 224. — ED.]

[4] Ante, § 37; Story on Partn. §§ 1, 101, 125.

[5] See 3 Kent, Comm. Lect. 43, pp. 41, 44, 45 (4th ed.); Story on Partn. ch. 7, §§ 101–125; Chemung Canal Bank *v.* Bradner, 44 N. Y. 680; [Adansonia Fibre Co., *In re*, L. R. 9 Ch. App. 635; Bottomley *v.* Nuttall, 5 C. B. N. S. 122; Bullen *v.* Sharp, L. R. 1 C. P. 36].

each is deemed the agent of the others, as to the ordinary repairs, employments, and business of the ship, in the absence of any known dissent.[1] But if any part-owner dissents, the others cannot bind his interest by their acts as agents, at least where the other party has notice of the dissent. A majority of the owners in interest have, however, a right to employ the ship, in case the minority dissent; and they may appoint a master of the ship, notwithstanding such dissent.[2] And the master so appointed will, *virtute officii*, become entitled to bind all the owners by his acts in the ordinary business of the ship, unless the party dealing with him has notice of such dissent,[3] or the dissenting owners have, by proper proceedings in the court of admiralty, placed themselves in a position not to be deemed owners for the voyage, undertaken by the majority.[4]

§ 41. The civil law adopted a policy substantially the same. If there were several owners or employers of a ship, each of them was liable *in solido*, and not merely in proportion to his share, for all the acts of the others in relation to the common concerns of the ship; and the master was treated as the common agent of all, and entitled to bind all. "Si plures navem exerceant, cum quolibet eorum in solidum agi potest. Nec quicquam facere, quotam quisque portionem in nave habeat; eumque qui præstiterit, societatis judicio a cæteris consecuturum.[5] Sed si plures exerceant, unum autem de numero suo magistrum fecerint, hujus nomine in solidum poterunt conveniri."[6] And this rule applied not only in cases of contracts

[1] See 2 Bell, Comm. B. 7 ch. 2, §§ 4, 1222, 1223, p. 638 (4th ed.); Id. pp. 655, 656 (5th ed.); Story on Partn. §§ 412–440; Curling *v.* Robertson, 7 Mann. & Gr. 341; [Holladay *v.* Daily, 19 Wall. 607].

[2] Abbott on Shipp. Pt. 1, ch. 3, §§ 2–9, pp. 68–77, and notes to Amer. ed. 1829; Id. Pt. 2, ch. 4, §§ 1, 6, note to p. 133; 1 Bell, Comm. B. 3, Pt. 1, ch. 5, § 433, p. 412 (4th ed.); Id. pp. 506, 507 (5th ed.); Story on Partn. §§ 418–452.

[3] [If a husband and wife own a vessel of which he is master, she is jointly liable with him on contracts for its employment made by him within the scope of the master's authority. Reiman *v.* Hamilton, 111 Mass. 245. And part-owners by joint employment of a ship become partners in respect to the adventure. Bovill *v.* Hammond, 6 B. & C. 149. See also Keay *v.* Fenwick, L. R. 1 C. P. D. 745. — Ed.].

[4] Abbott on Shipp. Pt. 1, ch. 3, § 4, pp. 70–72, 74, note (1). (Amer. ed. 1829); Id. Pt. 2, ch. 2, § 2, pp. 90, 91; Story on Partn. §§ 427–440.

[5] Dig. Lib. 14, tit. 1, l. 1, § 25; Id. l. 3; Pothier, Pand. Lib. 14, tit. 1, n. 10; Pothier on Oblig. n. 450.

[6] Dig. Lib. 14, tit. 1, l. 4, § 1; Id. tit. 3, l. 13, § 2; Pothier, Pand. Lib. 14, tit. 1, n. 10, 11, 13; Id. tit. 3, n. 19; Heinecc. ad Pand. Pt. 4, Lib. 14, tit. 1, § 140; 1 Voet, ad Pand. Lib. 14, tit. 1, § 5; 1 Domat, B. 1, tit. 16, § 3, arts. 6, 7; Ersk. Inst. B. 3, tit. 3, §§ 43, 45. There are some real or apparent

made by the master with strangers, but in contracts made with one of the owners or employers. "Si unus ex his exercitoribus cum magistro navis contraxerit, agere cum aliis exercitoribus poterit."[1]

§ 42. (2.) In regard to two or more agents. It is a general rule of the common law, that where an authority is given to two or more persons to do an act, the act is valid to bind the principal, only when all of them concur in doing it; for the authority is construed strictly, and the power is understood to be joint and not several.[2] Hence it is, that if a letter of attorney is made to two persons, to give or to receive livery, both must concur in the act, or the livery is void.[3] So, if an authority is given to two persons jointly to sell the property of the principal, one of them cannot separately execute the authority.[4] Indeed, so strictly is the authority construed, that if it be given to three persons jointly and severally, two cannot properly execute it; but it must be done by one, or by all.[5] How-

exceptions to the generality of the rule; for it is said, almost in the same connection: Si tamen plures per se navem exerceant, pro portionibus exercitionis conveniuntur; neque enim invicem sui magistri videntur. Dig. Lib. 14, tit. 1, l. 4; 1 Domat, B. 1, tit. 16, § 3, art. 7. From this passage it would seem, that although each was liable for the whole charge, where the contract was made by a master appointed on behalf of all; yet, where they all acted in the ship's business without any master, each was liable only for his share or proportion. Probably this was applied to cases, where the party, dealing with them, knew the several interest of each, and contracted with each in regard to his share only. Voet, in commenting upon this passage, uses the following language: Nisi singula per se navem exerceant sine magistri ministerio, tunc enim; quia invicem sui magistri non sunt, pro proportionibus Exercitionis singuli convenienti forent. 1 Voet, Comm. Lib. 14, tit. 1, § 5. See also Pothier, Pand. Lib. 14, tit. 1, n. 10, 11; Ersk. Inst. B. 13, tit. 3, § 45, n. 13. Among the maritime nations of the continent, Heineccius seems to think that the rule, that all the employers shall be liable in solido, does not prevail (vix datur): at least that it does not prevail in Holland. Heinecc. ad Pand. Pt. 3, Lib. 14, tit. 1, § 142. See Pothier on Oblig. n. 450, 451; Ersk. Inst. B. 3, tit. 3, § 45.

[1] Dig. Lib. 14, tit. 1, l. 5, § 2; Pothier, Pand. Lib. 14, tit. 1, n. 9–11, 13.

[2] Inhab. of Parish in Sutton *v.* Cole, 3 Pick. 232; Damon *v.* Inhab. of Granby, 2 Pick. 345; Kupfer *v.* Inhab. of South Parish in Augusta, 12 Mass. 185; Low *v.* Perkins, 10 Vt. 532; [Despatch Line of Packets *v.* Bellamy Manufact. Co., 12 N. H. 226; Post, § 139 *a*; Woolsey *v.* Tompkins, 23 Wend. 324; Johnston *v.* Bingham, 9 Watts & Serg. 56; Heard *v.* March, 12 Cush. 580; Cross *v.* The United States, 24 Boston Law Rep. 224; Rollins *v.* Phelps, 5 Min. 463; Hartford Fire Ins. Co. *v.* Wilcox, 57 Ill. 180.]

[3] Co. Litt. 49 b, 112 b, 413, and Harg. n. 2, id. 181 b; Com. Dig. *Attorney*, C. 11; Green *v.* Miller, 6 John. 39.

[4] Copeland *v.* Merc. Ins. Co., 6 Pick. 198; Post, § 139 a.

[5] Co. Litt. 181 b; Com. Dig. *Attorney*, C. 11; 1 Roll. Abridg. *Authoritie*, p. 329, B. 7; Bac. Abridg. *Authority*, C. See Guthrie *v.* Armstrong, 5 B.

ever, the rule of interpretation is not so rigid, as to overcome the apparent intent of the party, if the words can be so construed, as to reach the case. Thus, if an authority be given to A. and B., or either of them, a joint execution, or a several execution by either of them, will be a valid execution of it.[1] So, a power of attorney by a party to fifteen persons named therein, as his attorneys, "jointly and separately for him and in his name, to sign and order all such policies as they, his said attorneys, *or any of them*," should jointly and separately think proper, has been held to make a policy, executed by four of these persons, binding upon the principal.[2]

§ 43. The same strictness in principle, although not perhaps the same strictness in the construction of the language of the authority, prevailed in the civil law; for in that law the agent was bound to follow the terms of the agency. "Diligenter fines mandati custodiendi sunt.[3] Conditio autem præpositionis servanda est. Quid enim, si certa lege, vel interventu cujusdam personæ vel sub pignore, voluit cum eo contrahi, vel ad certam rem; æquissimum erit, id servari, in quo præpositus est." [4] And if the authority was delegated

& Ald. 628. This doctrine is regularly true in relation to private agencies only; for in public agencies an authority executed by a majority would be held obligatory, and a good execution of it. Lord Coke (Co. Litt. 181 b) takes notice of this distinction and says: "Secondly, there is a diversity between authorities created by the party for private causes, and authority created by law, for execution of justice." 1 Roll. Abridg. 329, l. 5; Com. Dig. *Attorney*, C. 15; Bac. Abridg. *Authority*, C. See also Green *v.* Miller, 6 Johns. 39; Grindley *v.* Barker, 1 Bos. & Pull. 229, 234; The King *v.* Beeston, 3 T. R. 592; (Sprague *v.* Bailey, 19 Pick. 436; Williams *v.* Lunenburgh, 21 Pick. 75; Martin *v.* Lemon, 26 Conn. 192; People *v.* Batchelor, 28 Barb. 310; Cooley *v.* O'Connor, 12 Wall. 391).

[1] Co. Litt. 49 b; Dyer, 62; [Cedar Rapids, &c., R. R. Co. *v.* Stewart, 25 Iowa, 115].

[2] Guthrie *v.* Armstrong, 5 B. & Ald. 628. [But where two persons are appointed agents jointly to take charge of the business of their principal for a specified time, and one of them becomes incapacitated, the business cannot be conducted by the other alone. Salisbury *v.* Brisbane, 61 N. Y. 617; and an authority to B. and C. to use the principal's name as an indorser can only be executed by the two persons jointly. Union Bank *v.* Beirne, 1 Grat. 226. But this rule applies only where the authority is given to the agents by the act of the principal, and not where it is conferred upon them by law. Jewett *v.* Alton, 7 N. H. 253; Scott *v.* Detroit Society, 1 Doug. (Mich.) 119; Caldwell *v.* Harrison, 11 Ala. 755. Thus, where power for a public purpose is delegated to a certain number, the decision of a majority governs. Soens *v.* Racine, 10 Wis. 271; Worcester *v.* Railroad Com., 113 Mass. 161. — Ed.]

[3] Dig. Lib. 17, tit. 1, l. 5; Post, §§ 70, 87, 88, 174.

[4] Dig. Lib. 14, tit. 3, l. 11, § 5; Pothier, Pand. Lib. 14, tit. 3, n. 16; Post, §§ 70, 174.

to several, care was to be taken to ascertain whether all were required to act together, or whether one alone might act; for otherwise the act of one would be void. "Item, si plures habuit Institores; vel cum omnibus simul contrahi voluit, vel cum uno solo." [1]

§ 44. But although the rule of the common law is thus strict, yet it is not inflexible, and in commercial transactions a more liberal interpretation in favor of trade is admitted, as thereby public confidence, as well as general convenience, is best consulted.[2] Hence it is, that, in cases of a joint consignment of goods for sale to two factors (whether they are partners or not), each of them is understood to possess the whole power over the goods for the purposes of the consignment; for it has been well said, that every consignment to two factors jointly, imports a consent by the consignor for them to trust one another; and to deliver over the goods from one to the other for the purpose of sale.[3] On the other hand, such joint factors are co-obligors, or co-contractors, and, as such, are jointly accountable, and answerable for one another for the whole.[4] And this rule is in entire coincidence with the civil law, which makes joint factors and other agents responsible *in solido* for each other. "Duobus quis mandavit negotiorum administrationem. Quæsitum est, an unusquisque mandati judicio in solidum teneatur? Respondi, unumquemque pro solido conveniri debere, dummodo ab utroque non amplius debito exigatur." [5]

[1] Dig. Lib. 14, tit. 3, l. 11, § 5; Pothier, Pand. Lib. 14, tit. 3, n. 16; 1 Domat, B. 1, tit. 15, § 3, art. 14; 1 Stair, Inst. by Brodie, B. 1, tit. 12, § 13.

[2] [See French *v.* Price, 24 Pick. 13. An authority to several assignees to receive money on a debt due to their assignor may be exercised by one assignee in behalf of all. Heard *v.* Lodge, 20 Pick. 59.]

[3] Godfrey *v.* Saunders, 3 Wils. 94, 114. See Willett *v.* Chambers, Cowp. 814. See 1 Stair, Inst. by Brodie, B. 1. tit. 12, §

[4] Godfrey *v.* Saunders, 3 Wils. 94, 114.

[5] Dig. Lib. 17, tit. 1, l. 60, § 2; Pothier, Pand. Lib. 17, tit. 1, n. 24; 1 Domat, B. 1, tit. 15, § 3, art. 13; 1 Stair, Inst. by Brodie, B. 1, tit. 12, §§ 13, 14.

CHAPTER V.

APPOINTMENT OF AGENTS.

§ 45. In the next place let us proceed to the consideration of the various modes in which agents may be appointed, and the nature and extent of the authority, which is, or may be, conferred on them. An agency may be created by the express words or acts of the principal, or it may be implied from his conduct and acquiescence. So, also, the nature and extent of the authority of an agent may be expressly given by a solemn, or an unsolemn instrument, or it may be implied or inferred from circumstances.

§ 46. First. As to the modes of appointment of an agent. It is sometimes laid down in our books, that the delegation of authority to an attorney, or agent, should be by a deed or instrument under seal, for the reason, that it may appear, that the attorney or substitute had a commission or power to represent the party; and also, that it may appear, that the authority has been well pursued.[1] But this, as a general rule, is manifestly incorrect; and especially in regard to commercial transactions, where most matters of agency are transacted by informal instruments, or by verbal or implied delegations of authority.[2]

§ 47. The general rule may, indeed, be laid down the other way; that an agent or attorney may ordinarily be appointed by parol, in the broad sense of that term at the common law; that is, by a verbal declaration in writing, not under seal, or by acts and implications.[3] And it is absolutely indispensable for the exigencies of commercial business, that the rule should be so; for otherwise, the most ordinary transactions, as well between persons in the same country, as between persons in foreign countries, would be greatly embarrassed, if

[1] Bac. Abridg. *Authority*, A. See also Co. Litt. 52 a; Com. Dig. *Attorney*, C. 5; [Burwell *v.* Orr, 84 Ill. 465].

[2] 3 Chitty on Com. & Manuf. 194, 195; Long *v.* Colburn, 11 Mass. 97, 98; Post, §§ 54, 55, 84–106.

[3] 3 Chitty on Com. & Manuf. 5; Id. pp. 194, 195; Rann *v.* Hughes, 7 T. R. 350; [Howe Machine Co. *v.* Clark, 15 Kans. 492].

not entirely obstructed. Thus, for example, if no one could sign or negotiate a promissory note, or bill of exchange, or sell or buy goods, or write a letter, or procure a policy for another, unless by a formal authority under seal, the occasions for the multiplication of such instruments would be almost innumerable; and would retard, at every step, the operations of merchants, and their factors, and clerks and other agents. The wisdom of the common law, therefore, has adopted and followed the rule on this subject prescribed in the civil law; and has allowed the authority to be conferred by verbal delegations, by informal writings, and by implication as well as by deeds. "Procurator constitutus vel coram, vel per nuncium, vel per epistolam."[1] The plain reason is, that all, which ought to be required in ordinary cases, is the proof of the consent of the principal. "Obligatio mandati consensu contrahentium consistit."[2]

§ 48. There are a few exceptions to the rule, proper to be considered, which seem, however, to have their true foundation in the strict principles and solemnities, required by the common law in regard to the transfer of real estate, and to the creation of formal obligations and covenants under seal, rather than in any enlarged public policy, applicable to the business and concerns of modern society.

§ 49. One exception is, that, whenever any act of agency is required to be done in the name of the principal under seal, the authority to do the act must generally be conferred by an instrument under seal.[3] Thus, for example, if the principal should

[1] Dig. Lib. 3, tit. 3, l. 1, § 1; Pothier, Pand. Lib. 3, tit. 3, n. 3; 1 Domat, B. 1, tit. 15, § 1, art. 5.

[2] Dig. Lib. 17, tit. 1, l. 1; Post, § 87; 1 Stair, Inst. by Brodie, B. 1, tit. 12, § 12.

[3] Co. Litt. 48 b, and Harg. note (2); 2 Roll. Abridg. 8, pl. 4; Coombe's case, 9 Co. R. 75, 77; Harrison *v.* Jackson, 7 T. R. 207; 3 Chitty on Com. & Manuf. 195; Damon *v.* Inhab. of Granby, 2 Pick. 345; 2 Kent, Comm. Lect. 41, p. 613 (4th ed.); Banorgee *v.* Hovey, 5 Mass. 11; Reed *v.* Van Ostrand, 1 Wend. 424; Hanford *v.* McNair, 9 Wend. 54; Blood *v.* Goodrich, 9 Wend. 68; Blood *v.* Goodrich, 12 Wend. 525; Cooper *v.* Rankin, 5 Binn. 613; Gordon *v.* Bulkley, 14 Serg. & Rawle, 331; Hunter *v.* Parker, 7 Mees. & Wels. 322, 343; Wells *v.* Evans, 20 Wend. 251; McNaughten *v.* Partridge, 11 Ohio, 223; Post, §§ 242, 252; Hibblewhite *v.* M'Morine, 6 Mees. & Wels. 200, 214, 215. In this last case, the instrument was executed by the grantor, and a blank was left for the name of the grantee, whose name was inserted by an agent appointed by parol; and it was held, that the instrument was void, because the appointment was not made by deed. Mr. Baron Parke, in declaring the opinion of the court, said: "Assuming, then, the instrument to be a deed, it was wholly improper, if the name of the vendee was left out; and to allow it to

authorize an agent to make a deed in his name, he must confer the authority on the agent by a deed.[1] A mere unsealed writing

be afterwards filled up by an agent appointed by parol, and then delivered in the absence of the principal, as a deed, would be a violation of the principle, that an attorney, to execute and deliver a deed for another, must himself be appointed by deed. The only case cited in favor of the validity of a deed in blank, afterwards filled in, is that of Texira *v.* Evans, where Lord Mansfield held, that a bond was valid, which was given, with the name of the obligee and sum in blank, to a broker to obtain money upon it, and he borrowed a sum from the plaintiff, and then inserted his name and the sum. But this case is justly questioned by Mr. Preston, in his edition of Shepp. Touch. 68, 'as it assumes there could be an attorney without deed;' and we think it cannot be considered to be law. On the other hand, there are several authorities, that an instrument, which has a blank in it, which prevents it from having any operation, when it is sealed and delivered, cannot become a valid deed by being afterwards filled up. In Com. Dig. *Fait*, A. 1, it is said, 'If a deed be signed and sealed, and afterwards written, it is no deed.' To the same effect is Shepp. Touch. 54. In Weeks *v.* Maillardet, the instrument had nothing to operate upon, as it referred to a schedule as annexed, which was not annexed at the time of execution; and it was held, that the subsequent annexation, in the absence of one of the parties, did not give it operation as part of the deed. So, where a bail bond was executed, and a condition afterwards inserted, it was held bad as a bail bond. Powell *v.* Duff. The cases cited on the other side were all of them distinguishable. In one, Hudson *v.* Revett, a blank in a part material was filled up; but having been done in *the presence* of the party, and ratified by him, it was held that there was evidence of redelivery. In another, Doe *v.* Bingham, the blanks filled up were in no respect material to the operation of the deed, with respect to the party who executed before they were filled up, — as to him the deed was complete. In a third, Matson *v.* Booth, the point decided was, that a complete bond was not rendered void by the subsequent addition of another obligor with the assent of all parties.

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[1] [It has been held that the authority of an agent to make a contract for the sale of real estate need not be under seal, Riley *v.* Minor, 29 Mo. 439; Rottman *v.* Wasson, 5 Kan. 552; Baum *v.* Dubois, 43 Pa. St. 260: nor even in writing, Dickerman *v.* Ashton, 21 Minn. 538. But if a purchaser relies upon such authority, and seeks to enforce the contract, the proof to establish the power of the agent must be clear, certain, and specific. Proudfoot *v.* Wightman, 78 Ill. 553. See Worrall *v.* Munn, 1 Selden, 229; Clements *v.* Macheboeuf, 92 U. S. 418. And where a contract which need not be under seal is executed by an agent having authority to execute only simple contracts, the contract, although under seal, will be held binding upon the principal as a simple contract. Dickerman *v.* Ashton, *supra*; State *v.* Spartanburg R. R. Co., 8 S. C. 129. But see Cooper *v.* Rankin, 5 Binney, 613; Despatch Line *v.* Bellamy Man. Co., 12 N. H. 229; Hunter *v.* Parker, 7 Mees. & Wels. 322; Randall *v.* Van Vechten, 19 John. 61; Mitchell *v.* St. Andrew's Bay Land Co., 4 Florida, 200; Wood *v.* Auburn & Rochester Railroad, 4 Selden, 167; Ledbetter *v.* Walker, 31 Ala. 175; Bates *v.* Best, 13 B. Monr. 215; Baker *v.* Freeman, 35 Maine, 485; Wheeler *v.* Nevins, 34 Maine, 54. — ED.]

will not be sufficient to make the execution of the deed by the agent valid at law; although a court of equity might, in such a case, compel the principal to confirm and give validity to the deed.[1] The

It is unnecessary to go through the others which were cited on the argument. It is enough to say that there is none that shows that an instrument, which, when executed, is incapable of having any operation, and is no deed, can afterwards become a deed, by being completed and delivered by a stranger in the absence of the party who executed, and unauthorized by instrument under seal. In truth, this is an attempt to make a deed transferable and negotiable like a bill of exchange or exchequer bill, which the law does not permit." In America, there has been some diversity of opinion expressed on this latter point; and it has been held in some of our courts, that a subsequent parol ratification would give validity to a deed, either executed in blank and filled up by the agent, or executed by an agent without authority, and then ratified by the principal by parol. See Skinner *v.* Dayton, 19 Johns. 513; Cady *v.* Shepherd, 11 Pick. 400; Gram *v.* Seton, 1 Hall, 262. See these cases cited more fully in Story on Partn. § 122, note; Post, §§ 242, 252. But in every such case it is still held to be indispensable, that the instrument should be expressed in apt words so as to bind the principal; for if it purports to be the deed of the agent in his own name, acting for his principal, no ratification, either by parol or otherwise, will make it the deed of the principal. Wells *v.* Evans, 20 Wend. 251; Post, §§ 264 a, 450. [The effect of the negotiation of shares of joint-stock companies, on the stock-exchange, with blank indorsements, has, first and last, been a good deal discussed, both in the English and American courts. There is now no question but the name of the transferors in blank, will justify the transferee in writing a valid transfer of the shares over the signatures. But there has been an effort made, by those most interested in stock speculations, to have such transfer convey a clean title, the same as the transfer of negotiable securities. But the courts have steadily resisted that doctrine, and generally hold that such transfer only conveys the title of the transferor, subject to all outstanding equities in others the same as in the transfer of other securities, not negotiable. Athenæum Life Ins. Co. *v.* Pooley, 3 De G. & J. 293; Agar *v.* Ath. Life Ins. Co. 6 W. R. C. B. 277; Tayler *v.* The Great Indian Peninsular Railw. Co. 4 De G. & J. 558; s. c. 5 Jur. N. s. 1087. And the same rule obtains in this country. Mechanics Bank *v.* N. Y. & N. H. Railw. Co. 13 N. Y. 599; s. c. 4 Duer, 480; Bridgeport Bank *v.* N. Y. & N. H. R. Co. 30 Conn. 231; Sewall *v.* Boston Water Power Co. 4 Allen, 277; Shaw *v.* Spencer, 100 Mass. 382; Cummins *v.* Cassilly, 5 B. Mon. 74. — R.]

[1] Harrison *v.* Jackson, 7 T. R. 208; Horsley *v.* Rush, cited Ibid.; Williams *v.* Walsby, 4 Esp. 220; Steiglitz *v.* Egginton, Holt, N. P. 141; Berkley *v.* Hardy, 5 B. & Cressw. 355; Hanford *v.* McNair, 9 Wend. 54; McNaughten *v.* Partridge, 11 Ohio, 223. [A conveyance of land to a purchaser for a valuable consideration, made by an agent of the owner authorized by a letter of attorney not under seal to sell such land, is in equity evidence sufficient of a contract to convey, to sustain an action by such purchaser against the principal for specific performance of such contract. Such conveyance, although inoperative as a transfer of the legal title, yet vests in the grantee an equitable title to the land, which is superior to the legal title of a subsequent grantee of the principal, with notice of the letter of attorney and the conveyance by the agent; and the

ground of this doctrine seems to be, that the power to execute an instrument under seal should be evidenced by an instrument of equal solemnity;[1] by analogy to the known maxim of the common law, that a sealed contract can only be dissolved or released [2] by an instrument of as high a dignity or solemnity; — "Eodem modo, quo oritur, eodem modo dissolvetur."[3]

§ 50. The common law, however, has not entirely followed out the principle of this exception; for it does not require, that an authority to an agent to sign an unsealed paper, or a written contract, should also be by a writing. Thus, for example, an agent may, by a verbal authority, or by a mere implied authority, sign or indorse promissory notes for another.[4] And, even where a statute, such as the statute of frauds, requires an instrument to be in writing, in order to bind the party, he may, without writing, authorize an agent to sign it in his behalf, unless the statute positively requires that the authority also should be in writing.[5] So where an agreement is in writing not under seal, it may be dissolved by parol.[6]

subsequent grantee may be decreed to convey the legal estate to the holder of the equitable title. Groff *v.* Ramsey, 19 Minn. 44. — G.]

[1] Ibid.; 3 Chitty on Com. & Manuf. 195.

[2] [In Brookshire *v.* Brookshire, 8 Iredell, 74, it was held that a power of attorney, although under seal, might be revoked by parol.]

[3] Bac. Abridg. *Release*, A. 1.; Neal *v.* Sheaffield, Cro. Jac. 254; 2 Saund. R. 47, Williams's note (1.); Hayford *v.* Andrews, Cro. Eliz. 697. The civil law seems to have acted throughout upon this principle, as to the dissolution of contracts, although not as to the creation of agencies. Nihil (says the Digest), tam naturale est, quam eo genere quidque dissolvere, quo colligatum est. Ideo verborum obligatio verbis tollitur; nudi consensus obligatio contrario consensu dissolvitur. Dig. Lib. 50, tit. 17, l. 35. See also Pothier on Oblig. by Evans, n. 571–580. Prout quidque contractum est, ita et solvi debet; ut cum re contraxerimus, re solvi debet. Dig. Lib. 46, tit. 3, l. 80. Pothier, Pand. Lib. 50, tit. 17, n. 1388. Et cum verbis aliquid contraximus, vel re, vel verbis, obligatio solvi debeat; verbis, veluti cum acceptum promissori fit; re, veluti cum solvit, quod promisit. Æque cum emptio, vel venditio, vel locatio contracta est; quoniam consensu nudo contrahi potest, etiam dissensu contrario dissolvi potest. Dig. Lib. 46, tit. 3, l. 80; Post, §§ 51, 125.

[4] Anon. 12 Mod. 564; Rawson *v.* Curtis, 19 Ill. 456. In Vanhorne *v.* Frick, 6 Serg. & Rawle, 90, the Supreme Court of Pennsylvania held, that a sale of lands, made by an agent under a parol authority, is void.

[5] Coles *v.* Trecothick, 9 Ves. 250; 2 Kent, Comm. Lect. 41, pp. 613, 614

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[6] Legal *v.* Miller, 2 Ves. 299; Coles *v.* Trecothick, 9 Ves. 250; Mortlock *v.* Buller, 10 Ves. 311; Shaw *v.* Nudd, 8 Pick. 9; Botsford *v.* Burr, 2 John. Ch. 416; Clinan *v.* Cooke, 1 Sch. & Lef. 22; Ante, § 49; Post, §§ 242, 252; Story on Partn. §§ 117–122; Gow on Partn. ch. 2, § 2, pp. 58–60 (3d ed.).

§ 51. And this very exception, as to instruments under seal, has an exception introduced into its generality; for although a person cannot ordinarily sign a deed for and as the agent of another, without an authority given to him under seal;[1] yet this is true only in the absence of the principal; for if the principal is present, and verbally or impliedly authorizes the agent to fix his name to the deed, it becomes the deed of the principal; and it is deemed, to all intents and purposes, as binding upon him, as if he had personally sealed and executed it.[2] The distinction may seem nice and refined; but it proceeds upon the ground, that where the principal is present, the act of signing and sealing is to be deemed his personal act, as much as if he held the pen, and another person guided his hand and pressed it on the seal.

§ 52. Another exception founded upon the strict notions of the old common law, is, that the agent of a corporation must ordinarily

(4th ed.); Higgins *v.* Senior, 8 Mees. & Wels. 844; Post, §§ 269, 270. In the work of Mr. Paley on Agency, ch. 3, pt. 1, n. 3, p. 260, as edited by Mr. Lloyd, the rule and the distinction are stated in very clear terms. "For the purposes described in the 1st, 2d, and 3d sections of the statute of frauds, that is, for the purpose of making and creating leases, estates, interests of freehold, or terms for years, or any uncertain interest, other than leases under three years, in messuages, manors, lands, tenements, or hereditaments, by an agent, or for surrendering the same (except copyhold interests), the authority of the agent must be in writing. But for the purposes described by the fourth section, viz., 'to charge executors or administrators out of their own estates; or to charge any for the debt or default of another; or upon an agreement in consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement not to be performed within a year;' although the several agreements recited must be in writing, signed by the party, or his agent thereunto by him lawfully authorized, the authority is not required to be in writing. And therefore the authority to contract for a lease, or other interest in land, need not be in writing, though the authority to sign the lease, or instrument, by which the interest passes, must be so. Neither does the 17th section, relating to the sale of goods above £10, which requires a note or memorandum in writing, signed by the parties to be charged, or their agents thereunto lawfully authorized, make it necessary, that the authority should be in writing." 2 Kent, Comm. Lect. 41, p. 614 (4th ed.); [Brookshire *v.* Brookshire, 8 Ired. 74; Long *v.* Hartwell, 34 N. J. 116].

[1] But see Cady *v.* Shepherd, 11 Pick. 400, cited Ante, § 49; and Post, §§ 242, 252, which is the other way. The doctrine, however, in Hibblewhite *v.* M'Morine, 6 Mees. & Wels. 200, 214, 215, is strongly in support of the text, and indeed seems firmly established, not only in England, but in most of the states of the union. 2 Kent, Comm. Lect. 41, p. 614 (4th ed.).

[2] Ball *v.* Dunsterville, 4 T. R. 313, 314; Lord Lovelace's case, W. Jones, 268; Hibblewhite *v.* M'Morine, 6 Mees. & Wels. 200, 214, 215; [Gardner *v.* Gardner, 5 Cush. 483; King *v.* Longuor, 4 B. & Adolph. 647; 1 Nev. & Man. 576].

receive his appointment to do any act for the corporation by an instrument under the common seal of the corporation; for (it has been said) a corporation cannot otherwise signify its assent to the agency, or the act, than under its common seal.[1] But this doctrine, although perhaps regularly true under the old common law, in regard to the solemn acts of corporations, which by that law, are incapable of acting, except by some consent or act made known through its common seal, has been greatly modified in modern times, and especially in relation to corporations created by charters of the crown or government, or by statutes. In cases of this sort, as the powers of the corporation to act depend essentially upon the modes pointed out by the charter, it is very clear, that an agent, appointed by the trustees, or directors, or other functionaries of the corporation, pursuant to the charter, would have full capacity to bind the corporation by a written vote.[2] And as the appointment of an agent may not always be evidenced by the written vote of such functionaries, it is now the settled doctrine, at least in America, that it may be inferred and implied from the adoption or recognition of the acts of the agent by such functionaries, or by the corporation.[3] Thus, for example, if the cashier of a bank should openly act as such in all the common transactions of the bank, with the full knowledge and assent of the directors, his acts would be obligatory upon the bank, although there might be no written vote on record to establish his appointment.[4]

[1] Com. Dig. *Franchise*, F. 12, F. 13; East London Water Works Co. *v.* Bailey, 4 Bing. 283, 286, 287.

[2] See Smith *v.* Birmingham Gas Co. 1 Adolph. & Ellis, 526; Bates *v.* Bank of State of Alabama, 2 Ala. 245, N. S.; Osborn *v.* Bank of United States, 9 Wheat. 738; 2 Kent, Comm. Lect. 33, pp. 288–291 (4th ed.); East London Water Works Co. *v.* Bailey, 4 Bing. 283; Slark *v.* Highgate Archway Co. 5 Taunt. 792; Broughton *v.* Manchester Water Works Co. 3 B. & Ald. 12; Murray *v.* East India Co. 5 B. & Ald. 204; Mayor, &c., of Ludlow *v.* Charlton, 6 Mees. & Wels. 815; London & Birm. Railway Co. *v.* Winter, 1 Craig & Phillips, 57; Hall *v.* Mayor, &c., of Swansea, 5 Adolph. & Ellis, N. S. 526.

[3] Bank of United States *v.* Dandridge, 12 Wheat. 64, 69, 70–72, 74; Yarborough *v.* Bank of England, 16 East, 6; Roe *v.* Dean, &c., of Rochester, 2 Camp. 96; 2 Kent, Comm. Lect. 33, pp. 288–291 (4th ed.); Essex Turnpike Corpor. *v.* Collins, 8 Mass. 299; Clark *v.* Corporation of Washington, 12 Wheat. 40; Bank of the Metropolis *v.* Guttchlick, 14 Peters, 19; Fleckner *v.* Bank of the United States, 8 Wheat. 338; Danforth *v.* Schoharie & Duane Turnpike Co. 12 John. 227.

[4] [Bank of United States *v.* Dandridge, 12 Wheaton, 64. Thus where the secretary of an insurance company, without any express authority, pledges bonds of the company, with the knowledge and subsequent acquiescence of the

§ 53. Indeed, in England, the rule itself has been subject to some relaxations from very early times. Thus, for example, it has been held, that for conveniency's sake, a corporation might act, in some ordinary matters, without seal; as to retain a butler, or a cook, or a servant.[1] And the courts have recently said that in cases of great necessity, they will imply an exception to the common rule; as, for example, where a corporation has wrongfully received the plaintiff's

directors, this was held equivalent to a prior authority. Darst *v.* Gale, 83 Ill. 136. So where an attorney of a bank, acting under the direction of the treasurer and of a trustee, brings a writ of entry to obtain possession of land taken on execution in favor of the bank, *held*, that these proceedings were valid, although no previous vote of the trustees authorizing them had been passed. Bristol Savings Bank *v.* Keary, 128 Mass. 298; Adams Express Co. *v.* Schlessinger, 75 Pa. St. 246. So where a laborer on a railroad is injured while in the service of the company, a telegram from the general superintendent, directing a subordinate to do all he can to save the injured man, was *held* to give sufficient authority for a contract binding the company to pay for his board and care while recovering. Atchison, &c. R. R. Co. *v.* Reecher, 24 Kan. 228. A committee, empowered by vote of a corporation to authorize the treasurer to convey real estate, may communicate such authority orally. Hutchins *v.* Byrnes, 9 Gray, 367. See also N. Y. Telegraph Co. *v.* Dryburg, 35 Pa. St. 298; Flint *v.* Chilton Co., 12 N. H. 430; Goodwin *v.* Union Screw Co., 34 N. H. 380. And an appeal bond, signed by S., as superintendent of a railroad company, was held a valid bond of the corporation. Collins *v.* Hammock, 59 Ala. 448. But a corporation cannot be held liable upon contracts, unless made by agents or officers having express or implied authority; thus, individual directors of a corporation cannot make such a contract, Lockwood *v.* Thunder Boom Co., 42 Mich. 536: nor use the funds of the corporation, in payment of a note made by them to the president of the corporation, even though it be for the benefit of the company, Gallery *v.* The Albion Exchange Bank, 41 Mich. 169: nor can the trustees of a religious society allow claims against the society which are barred by a statute of limitations, Union Village Church, *in re*, 6 Abb. (N. Y.) N. C. 398: nor can the superintendent of a corporation alter, vary, or enlarge contracts made by the corporation under its corporate seal, Boynton *v.* Lynn Gaslight Co., 124 Mass. 197: nor has the superintendent of a corporation authority to file an affidavit for the removal of a case into the Circuit Court of the United States, under statute of the United States, Mahone *v.* Manchester R. Co., 111 Mass. 72: but the general power conferred upon the agent of a railroad company to borrow money on its behalf includes authority to give to the lender of the money the ordinary securities, Hatch *v.* Coddington, 95 U. S. 48. — Ed.]

[1] Bank of Columbia *v.* Patterson's Adm'r, 7 Cranch, 299, 306; Bank of United States *v.* Dandridge, 12 Wheat. 69–71; Rex *v.* Biggs, 3 P. Will. 419, 424; Anon. 1 Salk. 191; Harper *v.* Charlesworth, 4 B. & Cressw. 590, 591; Yarborough *v.* Bank of England, 16 East, 6; Viner, Abridg. *Corporation*, K.; Smith *v.* Birmingham Gas Co. 1 Adolph. & Ellis, 526; East London Water Works Co. *v.* Bailey, 4 Bing. 283, 287; Com. Dig. F. 12, F. 13; Mayor, &c., of Ludlow *v.* Charlton, 6 Mees. & Wels. 815.

money.[1] So an agent, by an authority under seal, might bind the corporation by his agreement not under seal, if the agreement were within the scope of his authority.[2] In America, the general doctrine is now firmly established, that, wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts, made by its authorized agents, are express contracts of the corporation; and all duties imposed upon it by law, and all services rendered, and benefits conferred at the request of its agents, raise an implied promise, for the enforcement of which an action will lie against the corporation.[3] The same doctrine seems gradually to have found favor in England, and may now be deemed, after repeated and well considered adjudications, to be fully established, as the common law, at least, where the nature and business of corporations, created by charter or statute, constantly, if not daily, require contracts to be made to carry on its corporate operations. Indeed, the doctrine seems almost indispensable to meet the common duties and exigencies of corporations, created by charters or by statutes in

[1] Hall *v.* Mayor, &c., of Swansea, 5 Adolph. & Ellis, N. S. 526.

[2] Ibid.; Murray *v.* East India Co. 5 B. & Ald. 204; Bank of Columbia *v.* Patterson's Adm'r, 7 Cranch, 299, 305, 306; Bank of United States *v.* Dandridge, 12 Wheat. 64, 67–75; Fleckner *v.* Bank of United States, 8 Wheat. 338; Danforth *v.* Scoharie & Duane Turnpike Co. 12 John. 227; Mayor, &c., of Ludlow *v.* Charlton, 6 Mees. & Wels. 815. See also Metcalf & Perkins's Digest, title Corporation, ch. 1, § 145, &c.; Angell & Ames on Corporations, ch. 8, pp. 162–209 (2d ed.).

[3] Bank of Columbia *v.* Patterson's Adm'r, 7 Cranch, 299, 305, 306, and cases there cited; Bank of United States *v.* Dandridge, 12 Wheat, 64, 67, 68–75, and cases there cited; Mott *v.* Hicks, 1 Cowen, 513; 2 Kent, Comm. Lect. 33, p. 288; Kortright *v.* Buffalo Bank, 20 Wend. 91; Fleckner *v.* Bank of United States, 8 Wheat. 338; 2 Kent, Comm. Lect. 33, p. 291 (4th ed.), and the cases there cited in the note; Angell & Ames on Corporations, ch. 8, pp. 162–209 (ed. 1843); Att.-Gen. *v.* Life & Fire Ins. Co. 9 Paige, 470; Murray *v.* East India Co. 5 B. & Ald. 204, 210. The present doctrine in England seems to be, that an agent of a corporation need not be appointed under the seal of the corporation for acts, which are of an ordinary nature, and do not affect the interests of the corporation. Mr. Justice Taunton, in Smith *v.* Birmingham Gas Co. 1 Adolph. & Ellis, 530, said: "The distinction is between matters which do, and matters which do not, affect the interest of the corporation." See also East London Water Works Co. *v.* Bailey, 4 Bing. 283. The American doctrine seems to have proceeded upon a much broader ground; and to embrace all exercises of authority, which are in any way sanctioned by the corporation itself, or by its delegated directors, in regard to the rights, interests, or duties of the corporation, which are not, by the general laws of the land, required to be under seal, such as the passing of the title to real estate. See also Edwards *v.* Grand Junction Canal Co. 1 M. & Craig, 659, 672; Murray *v.* East India Co. 5 B. & Ald. 204, 209, 210, and cases cited; Ante, § 53, notes.

modern times; and it affords a beautiful illustration of the expansive power of the common law, which acquires flexibility, and moulds itself from time to time, so as to accomplish the various ends of modern society.[1]

[1] Without going to an earlier period, we may trace the gradual development and advancement of this doctrine from Rex *v.* Biggs, 3 P. Will. 419; Rex *v.* Bank of England, Doug. 524; Bank of England *v.* Moffat, 3 Bro. Ch. 262; Murray *v.* The East India Co. 5 B. & Ald. 204; East London Water Works Co. 4 Bing. 283; Mayor of Stafford *v.* Till, 4 Bing. 75; Tilson *v.* Warwick Gas-light Co. 4 B. & Cressw. 962; until we come to the case of Beverley *v.* The Lincoln Gas-light & Coke Co. 6 Adolph. & Ellis, 829, where the doctrine was examined with great learning and ability by Mr. Justice Patteson, in delivering the opinion of the court. On that occasion he said: "This therefore, brings us to the second question, which is, whether an action of assumpsit can be maintained against a corporation aggregate without a head, on an executed parol contract? It is well known that the ancient rule of the common law, that a corporation aggregate could speak and act only by its common seal, has been almost entirely superseded in practice by the courts of the United States in America. The decisions of those courts, although intrinsically entitled to the highest respect, cannot be cited as direct authority for our proceedings; and there are obvious circumstances which justify their advancing with a somewhat freer step to the discussion of ancient rules of our common law than would be proper for ourselves. It should be stated, however, that, in coming to the decision alluded to, those courts have considered themselves, not as altering the law, but as justified by the progress of previous decisions in this country and in America. We, on our part, disclaim entirely the right or the wish to innovate on the law upon any ground of inconvenience, however strongly made out; but when we have to deal with a rule established in a state of society very different from the present, at a time when corporations were comparatively few in number, and upon which it was very early found necessary to engraft many exceptions, we think we are justified in treating it with some degree of strictness, and are called upon not to recede from the principle of any relaxation in it which we find to have been established by previous decisions. If that principle, in fair reasoning, leads to a relaxation of the rule, for which no prior decision can be found expressly in point, the mere circumstance of novelty ought not to deter us; for it is the principle of every case, which is to be regarded; and a sound decision is authority for all the legitimate consequences which it involves. Several cases have determined that corporations aggregate may maintain actions on executed parol contracts. In the Dean and Chapter of Rochester *v.* Pierce, Lord Ellenborough first at Nisi Prius, and this court afterwards, held that they might sue in debt for use and occupation of their lands; and the Court of Common Pleas, in the Mayor of Stafford *v.* Till, held the same as to assumpsit. This establishes that, where a benefit has been enjoyed, such as the occupation of their lands, by their permission, the law will imply a promise to make them compensation, which promise they are capable of accepting, and upon which they may maintain an action. The action for use and occupation is established by stat. 2 G. II. ch. 19, § 14; and according to the words of the statute may be maintained "where *the agreement* is not by deed." Some agreement seems to be implied as the foundation; though it is well established that it need not amount to a formal demise, or even be express. To hold, then, that a cor-

§ 54. In regard to the mode ofappointment of an agent in cases not required by law to be under seal, it may be either express or

poration is within this statute, is to hold that it may be a party to an agreement not under seal, at least for the purpose of suing on it; and it would be rather strong to deny, at the same time, that it could be a party to it for the purpose of being sued on it. Lord Ellenborough, indeed, says, in the Dean and Chapter of Rochester *v.* Pierce, that the action for use and occupation does not necessarily suppose any demise. 'It is enough that the defendant used and occupied the premises by the permission of the plaintiff; and a corporation, as well as an individual, may without deed, permit a person to use and occupy premises of which they are seised.' But call it by whatever name we please, permission or demise, it clearly binds the corporation; the party occupying and paying rent under it acquires rights from the corporation, becomes their tenants from year to year, and can be ejected only by the same means as would be available for an individual landlord. Here, then, the law implies that the corporation has acted as a contracting party, and that, too, in a contract to the validity of which, for the purposes of this action, *the absence of any deed is essential.* If, in that case, an express agreement not under seal had been tendered in evidence to prove the terms on which the defendant held, it must have been received; and if, on the face of it, it had appeared that the plaintiffs had come under any conditions precedent to the recovery of rent on their part, such conditions would surely have been binding on them though not under seal; and the non-performance of them would have been in answer to the action. In The Southwark Bridge Co. *v.* Sills, the contract for letting was proved by a series of letters. We agree that the relation between the corporation and the occupier of its land, may commence without express contract; that it may, in the first instance, appear to want many of the legal incidents of the relation between landlord and tenant; but add the fact of payment of rent for one year, and acceptance by the corporation, and you add nothing of express contract on the part of the corporation; it has apparently done no more than acquiesce in the receipt of a certain compensation for the occupation of its land for a year; and yet by the addition of that fact, the corporation and the occupier are demonstrated to be landlord and tenant. This appears to us to show that, in the eye of the law, the relation between them commenced in contract, though it wanted at first the evidence from which it might be inferred. But, if this be a contract to which a corporation may be a party, though not under seal, and any rights resulting from that agreement come to be enforced, may not that form of action be applied, which is appropriate to parol agreements? Is it not unreasonable to hold, that a corporation may make a binding promise, and yet that assumpsit shall not be maintainable against it, if the promise be broken? If, then, it be established that, upon the same contract, the remedies are mutual, that if the corporation may sue its tenant in assumpsit on a parol demise, the tenant may in turn sue it in the same form of action, we do not see how it can be denied, that a corporation, occupying land, may be sued in assumpsit generally. We may suppose two contracts entered into at the same moment in writings not under seal; by the one, a corporation professes to demise its lands to A. B., by the other, A. B. demises his land to the corporation; an enjoyment of the premises is had under both. It would be surely an unsatisfactory state of the law, which should compel us to hold that, if the corporation sued A. B. in assumpsit for his rent, A. B. might not set off or sue in the same form for

implied. An express appointment may be by a formal written instrument; as by a power of attorney. A more common mode is

that which was due from the corporation. We have been thus minute in examining the case of use and occupation, because it appears to us very fairly to open the principle, on which this matter ought to stand. The same point has been ruled in an action for goods sold and delivered. The City of London Gaslight & Coke Co. *v.* Nicholls, was assumpsit for gas supplied; the objection was taken, that the contract was not under seal. Best, C. J., overruled it at once, saying: 'It is quite absurd to say, that there is any necessity for a contract by deed in such case.' If, in that case, a set-off had been pleaded for meters supplied to the company, could evidence in support of it have been rejected because there was no contract under seal for the supply? Yet, if it could not, upon what principle can it be maintained, that that supply might not have been made the ground of an action of indebitatus assumpsit? We have not overlooked the technical difficulty, which has been alleged upon the form of the declaration, in which a mere promise is stated. Part of our argument has already been addressed to meet it; it seems to us that it rests on no solid foundation. When the question is, whether a particular party can sue or be sued by a particular writ or count, or be counted against in any particular form? the true answer is to be found by putting another question: Can he enter into the contract, or bring himself, or be brought, within the special circumstances, which form essential parts of the statement in such writ or count? That this is the principle may be seen conclusively in the history of our forms of action, ancient and modern, given in the third volume of Blackstone's Commentaries. If, therefore, it be asked, whether a corporation can be sued in assumpsit? we ask, in return, can it bind itself by a parol contract? Can it make a promise? If it can, the former question must be answered in the affirmative. We, therefore, agree with the Court of Common Pleas in The Mayor of Stafford *v.* Till, that there is no substantial difference in this respect between assumpsit and debt. Every count, indeed, in debt for goods sold and delivered, charges a contract; 'the words "sold and delivered,"' says Buller, J., in Emery *v.* Fell, 'imply a contract; for there cannot be a sale, unless two parties agree.' De Grave *v.* The Mayor and Corporation of Monmouth, was debt against a corporation for the price of weights and measures. It was contended that the action could not be maintained, as a corporation cannot contract unless by some instrument under the common seal. The delivery had been proved, on examination of the goods at a full meeting of the corporation, and subsequent use of them; the order for them was by the mayor de facto, who was afterwards ousted. Lord Tenterden thought the examination was the exercise of an act of ownership, '*and that, by so doing, the corporation have recognized the contract.*' The verdict passed for the plaintiffs, and was not disturbed. The recognition of a contract is its adoption, — the taking it to be the contract of the party so recognizing it; but that assumes it to be a contract, which the party was capable of entering into. Lord Tenterden, therefore, must have considered the corporation as capable of contracting for the purchase of goods without a deed. And in Dunstan *v.* The Imperial Gas Light Co. where the plaintiff failed on another ground, he carefully guards himself from being supposed to decide the contrary. We certainly have not found any decided case, in which it has been held that a corporation may be sued in assumpsit on an executed parol contract, a circumstance of great, but not conclusive, weight.

by some informal written instrument, as by a letter of instructions, or by a written request, or by a memorandum for a sale or a pur-

For (not to mention that there is no case in which the contrary has been expressly decided upon argument), if it be remembered what the course of the law has been on this subject, we shall find that circumstance not unnatural, and that some deduction must be made from the weight of dicta unfavorable to our present view, which may be found here and there in the books upon this subject. At first, the rule appears to have been exclusive, as indeed its principle required it to be. A corporation, it was said, being merely a body politic, invisible, subsisting only by supposition of law, could only act or speak by its common seal; the common seal, in the words of Peere Williams, in Rex *v.* Bigg, was the hand and mouth of the corporation. The rule therefore stood, not upon policy, but on necessity, and was of course equally applicable to small as to great matters; to acts of daily or of rare occurrence; to what regarded personal as well as real property. But this, though true in theory, was intolerable in practice; the very act of affixing the seal, of lifting the hand, or opening the mouth, could only be done by some individual member, in theory quite distinct from the body politic, or by some agent; the management of the corporate property, the daily sustentation of the members, the performance of the very duties for which the corporation was created, required incessantly that acts should be done, sometimes of daily recurrence, sometimes entirely unforeseen, yet admitting of no delay, sometimes of small importance, or relating to property of little value. The same causes also required that contracts to a small amount should often be entered into. In all these cases, to require the affixing of the common seal was impossible; and therefore, from time to time, as the exigencies of the case have required, exceptions have been admitted to the rule; and what we desire to draw attention to is this, — that these exceptions are not such as the rule might be supposed to have provided for, but are in truth inconsistent with its principle and justified only by necessity. As each exception of this kind was made, it was not unnatural that the rule in all other yet unforeseen cases should receive confirmation, though it would be hardly fair to anticipate thence what the opinion of the judges would have been, if the cases had been presented before them and required their decision. In the progress, however, of these exceptions, it has been decided, that a corporation may sue in assumpsit on an executed parol contract; it has also been decided, that it may be sued in debt on a similar contract; the question now arises on the liability to be sued in assumpsit. It appears to us, that what has been already decided in principle, warrants us in holding that this action is maintainable. It seems clear that, for a matter of such constant requirement to a gas company as gas meters, and to so small an amount as £15, the company, whether with or without a head, might contract without affixing the common seal; see Bro. Abridg. *Corporations* and *Capacities*, pl. 56, Horn *v.* Ivy; and it is clear, that they might have been sued in debt for goods sold and delivered. For the reasons given, we think they are equally liable in assumpsit; and consequently, this rule will be discharged." This was followed up by the decision in Church *v.* The Imperial Gaslight and Coke Co. 6 Adolph. & Ellis, 846, where the court held, that it makes no difference as to the right of a corporation to sue on a contract entered into by them not under seal, whether the contract be executed or executory. On that occasion, Lord Denman, in delivering the opinion of the court, expounded the reasons of the doctrine in a very clear and satisfactory manner. He said:

chase, or for some other act of agency. But the most usual mode of appointment is by an unwritten request, or by implication from the

" Assuming it, therefore, to be now established in this court, that a corporation may sue or be sued in assumpsit upon executed contracts of a certain kind, among which are included such as relate to the supply of articles essential to the purposes for which it is created, the first question will be, whether, as affecting this point and in respect of such contracts, there is any sound distinction between contracts executed or executory. Now, the same contract, which is executory to-day, may become executed to-morrow: if the breach of it, in its latter state, may be sued for, it can only be on the supposition, that the party was competent to enter into it in its former; and, if the party were so competent, on what ground can it be said that the peculiar remedy, which the law gives for the enforcement of such a contract, may not be used for the purpose? It appears to us a legal solecism to say, that parties are competent, by law, to enter into a valid contract in a particular form, and that the appropriate legal remedies for the enforcement or on breach of such a contract, are not available between them. Where the action is brought for the breach of an executed contract, the evidence of the contract, if an express one, must be the same as if the action were brought while it was executory. An oral or written agreement, or a series of letters, might be produced to prove the fact, and the terms of the contract. Could it be contended that these would be evidence of a valid contract after execution, but of a wholly inoperative one before? Unless positions such as these can be maintained, we do not see how to support any distinction between express executory and executed contracts of the description now under consideration. A distinction, however, seems to be intimated, in some cases, between the express contract of the parties, and that which the law will imply for them from an executed consideration. And a validity is attributed to the latter, which is denied to the former. But there is no foundation for this; the difference between express and implied contracts, is merely a difference in the mode of proof. On the one hand, a plaintiff, who should sue on a contract to be implied from certain acts done, must be nonsuited if those acts were shown to be in compliance with stipulations antecedently entered into, unless he was prepared with evidence of all the stipulations. On the other hand, no contract can be implied from the acts of parties, or result by law from benefits received, but such as the same parties were competent expressly to enter into. And this is important in the present argument, because it makes the decisions on implied contracts authority for our decision upon an express one. Upon these grounds, we are prepared to decide that the present action was maintainable. So far, therefore, as the decision of the Court of Common Pleas in East London Water Works Co. *v.* Bailey, proceeded on the distinction between contracts executed and executory, we are compelled, after consideration, to express our opinion that it was wrongly decided. The case may be sustained, however, on another ground consistent with our previous remarks, and which affords another reason for our present decision. The general rule of law is, that a corporation contracts under its common seal; as a general rule, it is only in that way, that a corporation can express its will or do any act. That general rule, however, has from the earliest traceable periods been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact limit, that a merely circumstantial difference is to exclude

recognition of the principal, or from his acquiescence in the acts of the agent.[1]

from the exception. This principle appears to be convenience amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed. Hence the retainer, by parol, of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions. On the same principle stands the power of accepting bills of exchange, and issuing promissory notes, by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon. These principles were, it is evident, present to the attention of the Court of Common Pleas when the case in question was decided; and they might reasonably have held, that a contract with a water company, for the supply of iron pipes, was neither one of so frequent occurrence, or small importance, or so brought within the purpose of incorporation, that the principle of convenience above established, required it to be taken out of the general rule." See also London and Birmingham Railway Co. *v.* Winter, 1 Craig & Phillips, 57. A later case on the subject is that of the Mayor of Ludlow *v.* Charlton, 6 Mees. & Wels. 815, where it was held, that a municipal corporation cannot enter into a contract to pay a sum of money out of the corporate funds for the making improvements in the borough, except under the common seal. On that occasion, Mr. Baron Rolfe, in delivering the opinion of the court, said: "The rule of law on this subject, as laid down in all the old authorities, is, that a corporation can only bind itself by deed. See Comyns' Digest, tit. *Franchise* (F), 12, 13, and the authorities there referred to. The exceptions pointed out rather confirm than impeach the rule. A corporation, it is said, which has a head, may give a personal command, and do small acts; as it may retain a servant. It may authorize another to drive away cattle damage feasant, or make a distress, or the like. These are all matters so constantly recurring, or of so small importance, or so little admitting of delay, that to require in every such case the previous affixing of the seal, would be greatly to obstruct the every-day ordinary convenience of the body corporate, without any adequate object. In such matters, the head of the corporation seems, from the earliest time, to have been considered as delegated by the rest of the members to act for them. In modern times, a new class of exceptions has arisen. Corporations have of late been established, sometimes by royal charter, more frequently by act of parliament, for the purpose of carrying on trading speculations; and where the nature of their constitution has been such as to render the drawing of bills, or the constant making of any particular sort of contracts necessary for the purposes of the corporation, there the courts have held that they would imply in those, who are, according to the provisions of the charter or act of parliament, carrying on the corporation concerns, an

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[1] 2 Kent, Comm. Lect. 41, pp. 613–616 (4th ed.); 1 Bell, Comm. B. 3, Pt. 1 ch. 4, § 4, art. 410; Id. pp. 478–481 (5th ed.); American Ins. Co. *v.* Oakley, 9 Paige, 496; [Pickett *v.* Pearsons, 17 Vt. 470; Post, §§ 84–288; Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank, 16 N. Y. 145; Summers *v.* Solomon, 7 El. & Bl. 879. See Burton *v.* Furnis, 3 Hurl. & Nor. 926 (Am. ed.); Ramozotti *v.* Bowring, 7 J. Scott, N. S. 871].

§ 55. Cases of this latter description, arising from the grant of an agency by an unwritten or verbal request, or by implication, are

authority to do those acts, without which the corporation could not subsist. This principle will fully warrant the recent decision of the Court of Queen's Bench, in Beverley *v.* Lincoln Gas Light and Coke Co. The present case, however, was argued at the bar, as if, by the decision in that last case, the old rule of law was to be considered as exploded, and as if, in all cases of executed contracts, corporations were to be deemed bound in the same manner as individuals. But this would be pressing the decision in question far beyond its legitimate consequences; and that the Court of Queen's Bench had no such meaning, is plain from the subsequent case of Church *v.* Imperial Gas Light Co. Lord Denman, in delivering the judgment of the court in that case, says [Here the learned judge quoted the words of Lord Denman, already cited in this note, beginning with the words: "The general rule of law is, that a corporation contracts under its common seal; as a general rule it is only in that way that a corporation can express its will, or do any act. That general rule, however, has from the earliest traceable periods, been subject to exceptions," &c.]: To every word of this we entirely subscribe, and, applying the language of Lord Denman to the present case, it is quite clear, that there was nothing to enable the corporation of Ludlow to contract with the defendant otherwise than in the ordinary mode, under the corporate seal. In contracting without a seal, there was no paramount convenience so great as to amount almost to necessity. To have required a seal, would certainly not have tended to defeat the object for which the corporation was formed, nor was the subject-matter of the contract one either of frequent ordinary occurrence, or of urgency admitting no delay. Before dismissing this case, we feel ourselves called upon to say, that the rule of law requiring contracts entered into by corporations to be generally entered into under seal, and not by parol, appears to us to be one by no means of a merely technical nature, or which it would be at all safe to relax, except in cases warranted by the principles to which we have already adverted. The seal is required, as authenticating the concurrence of the whole body corporate. If the legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature, or otherwise, then, undoubtedly, the adding a seal would be matter purely of form, and not of substance. Every one becoming a member of such a corporation, knows, that he is liable to be bound in his corporate character by such an act; and persons dealing with the corporation know, that by such an act the body will be bound. But in other cases, the seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting, however numerously attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal, as a relic of ignorant times. It is no such thing; either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation; and the attempt to get rid of the old doctrine, by treating as valid contracts made with particular members, and which do not come within the exceptions to which we have adverted, might be productive of great inconvenience." In the still more recent case of The Fishmonger's Company *v.* Robertson, 5 Mann. & Gr. 131, the whole subject was elaborately dis-

very familiar in all the common business of life, and the common departments of trade. Thus, the appointment, by which the relation

cussed, and it was held, that a contract not under seal, which had been executed on the part of the corporation, and for which the defendants had received a full consideration, bound the other party. On that occasion, Lord Chief Justice Tindal said: "Upon the present state of the pleadings, the defendant Robertson has undoubtedly the right to raise any objection to the declaration which could have been made available on a general demurrer thereto; and it has accordingly been contended, on his behalf, that it may be assumed, from the declaration itself, that the contract, upon which this action is brought, was not sealed on the part of the plaintiffs with the common seal of the corporation; that, by the general rule of law, the plaintiffs, being a body corporate, cannot bind themselves by an agreement which is not under their common seal; that, although there are certain admitted and well-known exceptions to this general rule, yet that the present case does not fall within any of such exceptions; and, lastly, that if the agreement be such that the corporation is not bound thereby, and cannot be sued thereon, so neither can the other party be bound thereby, nor can the corporation sustain an action, as plaintiffs, upon such an agreement.

"We concur with some of the positions above laid down on the part of the defendants. From the statement of the contract itself on the face of the declaration, and the mode of its execution by an agent on behalf of the corporation, as there described, we think it may be inferred, that the defendant's counsel is entitled to assume, that the common seal of the corporation was never affixed thereto. We agree, also, in the general rule of law as above stated, and that the case now under consideration does not fall within any of those exceptions which are so well known as to require no enumeration; but, whatever may be the consequences, where the agreement is entirely *executory* on the part of the corporation, yet, if the contract, instead of being executory, is executed on their part, — if the persons, who are parties to the contract with the corporation, *have received* the benefit of the consideration moving from the corporation, — in that case, we think, both upon principle and decided authorities, the other parties are bound by the contract, and liable to be sued thereon by the corporation. Even if the contract put in suit by the corporation had been, on their part, executory only, not executed, we feel little doubt but that their suing upon the contract would amount to an admission on record by them that such contract was duly entered into on their part, so as to be obligatory on themselves; and that such admission on the record would estop them from setting up as an objection, in a cross-action, that it was not sealed with their common seal; on the same principle as it was held by Holt, C. J., and the court in The Mayor of Thetford's case, 'that, though a corporation cannot do an act *in pais* without their common seal, yet they may do an act *upon record;* and that is the case of the city of London every year, who make an attorney by warrant of attorney in this court without either sealing or signing; and the reason is, because they are estopped by the record to say that it is not their act. So, if an action be brought against a corporation for a false return, they are estopped to say it is not their return, for, it is responsio majoris et communitatis upon record.' And in the present case, the direct allegation by the corporation upon this record, that the agreement was made by Towse on their behalf, would, as we think, amount to an estoppel to the corporation from deny-

of master and servant is created, and the extent of the authority conferred on the latter, are ordinarily known and ascertained only

ing the obligatory force of the agreement in a subsequent action against themselves. But it is unnecessary to determine this point on the present occasion, because, on the face of the declaration, there is, as we apprehend, an averment of the performance by the corporation, of every matter which amounts to a condition precedent on their part; at least, we so assume in the present stage of the argument, and before considering the pleas of the defendant. The question, therefore, becomes this, whether, in the case of a contract executed before action brought, where it appears that the defendants have received the whole benefit of the consideration for which they bargained, it is an answer to an action of assumpsit by the corporation, that the corporation itself was not originally bound by such contract, the same not having been made under their common seal.

"Upon the general ground of reason and justice, no such answer can be set up. The defendants having had the benefit of the performance by the corporation, of the several stipulations into which they entered, have received the consideration for their own promise; such promise by them is therefore not nudum pactum; they never can want to sue the corporation upon the contract, in order to enforce the performance of those stipulations which have already been voluntarily performed; and therefore no sound reason can be suggested why they should justify their refusal to perform the stipulations made by them, on the ground of inability to sue the corporation, which suit they can never want to sustain. It may possibly be the case, that, up to the time of the corporation adopting the contract by performing the stipulations on their part, there was a want of mutuality, from the corporation not being compellable to perform their contract; and that the defendants might, during that interval, have the power to retract, and insist that their undertaking amounted to a nudum pactum only. But, after the adoption of the contract by the corporation, by performance on their part, upon general principles of reason, the right to set up this defence appears altogether to fail.

"Independently, however, of the reasonableness of such construction, there appears authority in law to support the position. In the case of The Barber Surgeons of London *v.* Pelson, — assumpsit for a forfeiture under a by-law, — where the objection was expressly taken, that a promise cannot be made to a corporation aggregate without deed, the court held that the action well lay, and that the objection had been overruled in The Mayor, &c., of London *v.* Goree. Again, in The Mayor, &c., of London *v.* Hunt, assumpsit was held to be maintainable by a corporation for tolls. In The Mayor, &c., of Stafford *v.* Till, use and occupation was held to be maintainable by a corporation aggregate, though there was no demise under seal, the tenant having occupied, and paid rent; and the same point was ruled in the case of The Dean and Chapter of Rochester *v.* Pierce. The case of The East India Company *v.* Glover, carries the law further; for the action in that case was not upon a promise implied by law on an executed consideration, as for goods sold, but was assumpsit by a corporation for not accepting and taking away coffee within the time mentioned by an agreement for sale. The objection, indeed, was not raised; but we cannot but suppose it would have been made, if thought maintainable; for, when the defendant wanted to show fraud upon the sale, on the execution of the writ of inquiry before Pratt, C. J., he refused to let in the evidence, say-

by implication from the recognition, or conduct, or acquiescence of the master.[1] As, where a clerk is employed in a shop or warehouse

ing, the defendant had admitted the contract to be as the plaintiff had declared, by suffering judgment by default, instead of pleading non assumpsit. And, again, the judgment of the court of error in Bowen *v.* Morris, although not directly an authority upon the point, shows a strong indication of the opinion of Mansfield, C. J., in support of the present action. In that case, the mayor of a corporation had signed a contract to sell landed property belonging to the corporation 'on behalf of himself and the rest of the burgesses and commonalty,' and the action was brought in the name of the mayor, who had signed the contract, to recover damages. The Lord Chief Justice, in giving judgment that the action was not maintainable in the name of the mayor, observes, 'that, although the corporation have not constituted the mayor their bailiff or agent by an instrument under seal, so that he was not competent by that contract to bind the corporation, yet as the mayor signed it, perhaps the corporation might have sustained an action on the contract.' And the cases referred to on guarantees (see particularly the judgment in Kennaway *v.* Treleavan), and on the statute of frauds, where the contract has been signed by the defendant only, and not by the plaintiff, but allowed to be enforced by action, notwithstanding the objection of a want of mutuality, tend strongly to support the principle on which we consider the present action maintainable. And the earlier case of Cooper *v.* Gooderick, may be adverted to, as showing the opinion of the court upon the legal consequence of bringing an action by a body corporate. In that case, the defendant, as bailiff of Emanuel College, made conusance for rent granted to them in fee by indenture. The issue was non concessit; and the jury found that the grantor granted it by the deed, and delivered that deed to a stranger to their use, and they sealed the counterpart of that indenture; the question was whether a stranger, without letter of attorney from them to receive it, might receive the deed to their use; and it was held by all the court that he might, and that the sealing of the counterpart was a sufficient agreement, and as well if they had made a letter of attorney; 'and, if they had not sealed the counterpart, but had brought an action upon it, *that* had made the grant perfect;' and judgment was given for the plaintiff.

"We therefore think the present action is maintainable by the corporation, unless some sufficient answer appears on the pleas, which we now proceed to consider." [See further on this subject, Mayor of Ludlow *v.* Charlton, 6 Mees. & Wels. 815; Church *v.* Imperial Gas Co. 6 Adolph. & Ellis, 861; Williams *v.* Chester Railway Co. 5 Eng. Law & Eq. 497; Diggle *v.* London Railway, 5 Exch. 442; Denton *v.* East Anglican Railway Co. 3 C. & K. 17; Clark *v.* Guardians of Cuckfield Union, 11 Eng. Law & Eq. 442; Paine *v.* Strand Union, 8 Q. B. 326, 810; Lamprell *v.* Billericay Union, 3 Exch. 283; Homersham *v.* Wolverhampton Waterworks Co. 4 Eng. Law & Eq. 426. One of the most recent cases on this subject, decided June 23, 1855, is that of Henderson *v.* The Australian Royal Mail Steam Nav. Co. 32 Eng. Law & Eq. 167. Wightman, J., said: "This is an action against the Australian Royal Mail Steam Navigation Company, which is a company constituted expressly for the purpose of carrying

[1] 1 Domat, B. 1, tit. 16, § 3, arts 1 and 4.

to sell goods, his authority to make a particular sale is implied from his ordinary occupation, and the acquiescence of the master.[1] So,

on a trade by vessels; it is incorporated 'for the purpose of undertaking the establishment and maintenance of a communication, by means of steam navigation or otherwise, and the carrying of the royal mails, passengers, and cargo, between Great Britain and Ireland, and the Cape of Good Hope and Australasia,' and for that purpose it must maintain and employ many vessels. Can it be doubted that, amongst the ordinary operations of the company, there would arise a necessity for employing persons to navigate or bring home vessels which met with accidents abroad? The words of the contract, as set out in the declaration, show an employment directly within the scope of the objects for which the company was incorporated. It is true that there is a conflict of authorities which it is difficult to reconcile. Two or three cases in the Court of Exchequer, Lamprell *v.* The Billericay Union, 3 Exch. 283, and The Mayor of Ludlow *v.* Charlton, 6 Mees. & Wels. 815, and Arnold *v.* The Mayor of Poole, 4 Mann. & Gr. 860, in the Court of Common Pleas, appear to militate against the view taken by this court. But those decisions proceeded upon a principle adapted to municipal corporations, which are created for other objects than trade; and the Court of Exchequer applied that principle to modern trading companies, which are of an entirely different character. In early times, there was a great relaxation of the rule which required that the contracts of corporations should be under seal, and that relaxation has been gradually extended. At first, the relaxation was made only in those cases mentioned by Mr. Lush, where the subject-matter of the contract was of small moment and frequent occurrence, which, in the case of municipal corporations, might be the only exceptions necessary. But in the later cases, there was a further relaxation, especially in the case of corporations created by charter for trading purposes, and other like corporations. The general result of the cases mentioned in Clark *v.* The Guardians of the Cuckfield Union, 16 Jur. 686; s. c. 11 Eng. Rep. 442, is, that in the case of trading corporations, wherever the contract relates, and is essential to the purpose for which the company was incorporated, it may be enforced, though not under seal. In deciding that case, I reviewed all the cases, and adhere to the opinion which I then expressed, that in such a case as the present, where the contract is essentially necessary to the objects of the company, and directly within the scope of their charter, it may be enforced, though made by parol." And Erle, J., added:

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[1] [A party, by accepting the benefits of a proposition, made by and through another party, constitutes the latter his agent. Milligan *v.* Davis, 49 Ia. 126. So the fact of the possession of a note and deed of trust by an agent, to whom they are entrusted, is sufficient evidence of authority to justify the debtor in making payment to him as the creditors' agent. Whelan *v.* Reilly, 61 Mo. 565. But an agency will not be presumed from a previous employment in a similar manner, where it does not appear that the former employment was with the principal's knowledge, although he received advantages from it. Cobb *v.* Hall, 49 Ia. 366. Nor does the fact that A employed B to buy lumber of C in making repairs upon his house on one occasion, raise a presumption that he employed B the next year to buy lumber of C. Greene *v.* Hinckley, 52 Ia. 633. See also Isbell *v.* Brinkmann, 70 Ind. 118; Kent *v.* Tyson, 20 N. H. 121; Robinson *v.* Greene, 5 Harrington, 115; Campbell *v.* Murray, 62 Ga. 86; Fisher *v.* Schiller Lodge, 50 Ia. 459. — ED.]

where a clerk is usually intrusted to sign notes, or usually does sign notes for his master, which are afterwards paid, or recognized to be

"I am of opinion that the contract is binding on the corporation, though not under seal, on the ground that it is directly within the scope of the company's charter. The authorities are apparently conflicting, but none conflict with the principle laid down by my brother Wightman, in which I concur. In Beverley *v.* The Lincoln Gas Light & Coke Co. 6 Adolph. & Ellis, 829, the supply of gas was directly incident to the purpose for which the company was incorporated. So also in Church *v.* The Imperial Gas Light & Coke Co. 6 Adolph. & Ellis, 846; and in Sanders *v.* The Guardians of the St. Neot's Union, 8 Q. B. 810; and in the elaborate judgment of Wightman, J., in Clark *v.* The Guardians of the Cuckfield Union, 16 Jur. 686; s. c. 11 Eng. Law & Eq. Rep. 442, it was assumed that the matter was within the scope of the company's charter. The judgment, delivered by Lord Campbell, C. J., for this court, in the Copper Miners' Co. *v.* Fox, 16 Q. B. 229; s. c. 3 Eng. Rep. 420, enunciated the principle. The principle affirmed by this series of cases, does not conflict with the two leading cases in the Court of Exchequer, which were cases of municipal corporations. Neither building, which was the matter in the Mayor of Ludlow *v.* Charlton, 6 Mees. & Wels. 815; nor litigation, which was the matter in Arnold *v.* The Mayor of Poole, 4 Mann. & Gr. 860, was incidental directly to the purposes for which the corporations of those towns were constituted. The other cases to which I adverted, were corporations for trading purposes, and it is difficult to reconcile them. In Lamprell *v.* The Guardians of the Billericay Union, 3 Exch. 283, the action related to the building of a workhouse, with which the defendants were, as a corporation, connected. Diggle *v.* The London and Blackwall Railway, 5 Exch. 442, is that which to the greatest degree conflicts, unless it can be distinguished, or explained on the ground that it was a unique contract; if it cannot, I do not agree to it; and in this conflict of authorities, I adhere to those which oppose it." — R.] [In a recent case, however, it was held that a contract for the engagement of a master of a workhouse, by a board of guardians, must, to bind them, be under their seal. Austin *v.* Guardians Bethnal Green, L. R. 9 C. P. 91. And a railroad company was held not bound by acts of its agent, although appointed under seal, in drawing, accepting, and indorsing bills of exchange, on the ground that the corporation itself had no authority to perform these acts. Bateman *v.* Mid-Wales R. Co., L. R. 1 C. P. 499. And for other instances, of later date than those cited in the previous note, where contracts made by managers of corporations, without authority under seal, have been held binding, see Wells *v.* Kingston, L. R. 10 C. P. 402; Wilson *v.* West Hartlepool R. R. Co., 2 De G. J. & S. 475; Smith *v.* Hull Glass Co., 11 C. B. 897.

Municipal Corporations. There does not seem to be any distinction between the contracts made by municipal and other corporations in this country; certainly not the distinction shown to exist in England by the preceding note. In New England, and generally, the business of such corporations is transacted by the town officers, who are chosen by the votes of the inhabitants, and whose contracts within the scope of their authority, whether oral, or in writing, are binding upon the municipalities. Almost the only exception to this rule, is the conveyance of the real estate of the town, which must be made by a sealed instrument. Angell & Ames on Corporations, chap. 8, pp. 162–209, 2d ed.; Mayor, &c. *v.* Reynolds, 20 Md. 14; Campbell *v.* Upton, 113 Mass. 67; Cutler

valid, he is presumed to possess a rightful authority to do so in other instances, within the scope of the same business.[1]

§ 56. And the nature and extent of the authority of the servant or agent, are often wholly deduced from the nature and extent of his usual employment. Hence it is (as we shall presently more fully see [2]) that the master is bound by the acts of the servant, within the scope of the usual business confided to him; for the master is presumed to authorize and approve the known acts, that are incident to such an employment. Thus, if a master usually intrusts his servant to buy goods upon credit, he will be bound by his acts of this sort even when he has prohibited him specially from buying upon credit; for the other party trusts to him, on account of the general habit of his employment, and the presumed assent of the master, who has held him out as having a competent authority for this purpose.[3] And it is a general rule, which will be abundantly illustrated in the course of these commentaries, that where one of two innocent persons must suffer by the misconduct of a third person, that party shall suffer, who, by his own acts and conduct, has enabled such third person, by giving him credit, to practise a fraud or imposition upon the other party.[4] And this is in perfect coincidence with the rule of the civil law, wherein it is said: "Semper, qui non prohibet pro se intervenire, mandare creditur.[5] Qui patitur ab alio mandari, ut sibi credatur, mandare intelligitur."[6] But of this more will be said under the next head.

v. Ashland, 121 Mass. 588; Tainter *v.* Worcester, 123 Mass. 311; Palmer *v.* Haverhill, 98 Mass. 487; Barnes *v.* District of Columbia, 91 U. S. 540; School Dist. *v.* Ætna Ins. Co., 62 Me. 330; Wamesit Power Co. *v.* Allen, 120 Mass. 352; Sceery *v.* Springfield, 112 Mass. 512. — Ed.]

[1] See Smith on Merc. Law, 106 (3d ed.), 1843; Dows *v.* Green, 16 Barb. 72; Chidsey *v.* Porter, 9 Harris (Penn.), 390.

[2] Post, §§ 84–106.

[3] 2 Kent, Comm. Lect. 41, pp. 614, 615, 626, 627 (4th ed.); Anon. 1 Shower, 95; Nickson *v.* Brohan, 10 Mod. 109–111; Pickering *v.* Busk, 15 East, 38; Barber *v.* Gingel, 3 Esp. 60; Rusby *v.* Scarlett, 5 Esp. 76, 77. See Wayland's case, 3 Salk. 284; Bolton *v.* Hillersden, 1 Ld. Raym. 225; Hazard *v.* Treadwell, 1 Str. 506; Williams *v.* Mitchell, 17 Mass. 98.

[4] Baring *v.* Corrie, 2 B. & Ald. 143. See Hazard *v.* Treadwell, 1 Str. 506; Post, § 264.

[5] Dig. Lib. 50, tit. 17, l. 60; Dig. Lib. 14, tit. 1, l. 1, § 5; Post, § 89; 2 Kent, Comm. Lect. 41, pp. 614–616 (4th ed.); Pothier, Pand. Lib. 17, tit. 1, n. 19.

[6] Dig. Lib. 17, tit. 1, l. 18; Pothier, Pand. Lib. 17, tit. 1, n. 19; Post, § 89.

CHAPTER VI.

NATURE AND EXTENT OF AUTHORITY.

§ 57. Let us next consider the nature and extent of the authority conferred on an agent. It may, as we have already seen, be a general authority, or it may be a special authority. It may be express, or it may be implied. In regard both to a general and to a special express authority, it may be conferred by a formal instrument, as by a letter of attorney under seal; or it may be by a writing of an informal and loose character, such as a letter, or a memorandum, or it may be by parol or oral declarations.[1]

§ 58. But whether it is conferred in the one way, or in the other, it is, unless the contrary manifestly appears to be the intent of the party, always construed to include all the necessary and usual means of executing it with effect.[2] Thus, for example, if a general authority is given to collect, receive, and pay all the debts due by, or to, the principal, it will occur to every one, who reflects upon the nature of such a trust, that numberless arrangements may be required fully to accomplish the end proposed; such as settling accounts, adjusting disputed claims, resisting unjust claims, answer-

[1] Ante, §§ 46–56.

[2] Howard *v.* Baillie, 2 H. Bl. 618; 3 Chitty on Com. & Manuf. 200, 201; Withington *v.* Herring, 5 Bing. 442; 1 Bell, Comm. 387, art. 412 (4th ed.); Rogers *v.* Kneeland, 10 Wend. 218; Peck *v.* Harriott, 6 Serg. & R. 146; Post, §§ 97, 101–106. [An agent employed to ship goods to the owner has authority to make such contract with the common carrier as in the honest exercise of his discretion he sees fit, Shelton *v.* Merchants' Transit Co., 59 N. Y. 258: and such agent has authority to stipulate for the terms of transportation, Nelson *v.* Hudson River R. R. Co., 48 N. Y. 498. See also Denman *v.* Bloomer, 11 Ill. 177; Barnett *v.* Lambert, 15 M. & W. 489; Payne *v.* Potter, 9 Ia. 549. But an authority, whether special or general, conferred upon an agent is to be construed as including only the usual means appropriate to the end. Therefore an authority to the general superintendent of an express company to employ and discharge agents, and to direct their conduct, make contracts, and exercise a general supervision over the business of the company, cannot be construed as empowering him to license an assistant superintendent to carry on a business in competition with that of the express company. Adams Ex. Co. *v.* Trego, 35 Md. 47. — Ed.]

ing or defending suits; and these subordinate powers (or, as they are sometimes called, mediate powers) are therefore, although not expressly given, understood to be included in, and a part of, or incident to, the primary power.[1] So, an authority given to recover and receive a debt, will authorize the attorney to arrest the debtor.[2] So, an authority given to a broker to effect a policy, will authorize him to adjust a loss under the policy, and adopt all the means necessary to procure an adjustment.[3] So, an authority to settle

[1] Howard *v.* Baillie, 2 H. Bl. 618–620; Com. Dig. *Attorney*, C. 15, citing Palmer, 394; [Sprague *v.* Gillett, 9 Met. 91; Fowler *v.* Bledsoe, 8 Humphreys (Tenn.), 509; Merrick *v.* Wagner, 44 Ill. 266;] Post, §§ 101–106.

[2] Ibid.; Post, § 103 and note.

[3] Richardson *v.* Anderson, 1 Camp. 43, note; 1 Emerig. Assur. ch. 5, § 4, p. 141; Post, §§ 103, 109, 191.

[*Authority of Insurance Agents.* — There has been a great deal of litigation in this country as to the power of agents of insurance companies, whether general or local, to bind the companies they represent, by acts in excess of the authority given them by their principals. The decisions of the different courts differ widely. In Harrison *v.* City Fire Ins. Co., 9 Allen, 233, Bigelow, C. J., says: "It is no answer to say that plaintiff had no knowledge of the limited extent of agent's authority. This he was bound to ascertain before dealing with him as agent. He is put on inquiry by the very fact that he is negotiating with an agent, and is bound to ascertain whether he can bind his principal in the transaction which he purports to carry on in his behalf." Davis *v.* Mass. Mutual Life Ins. Co., 13 Blatch. C. Ct. 462; Behler *v.* German Mut. Fire Ins. Co., 68 Ind. 347; Greene *v.* Lycoming Fire Ins. Co., 91 Pa. St. 387. A general agent has much more extensive powers, however, and the company is in general bound by his actions, where the party with whom he transacts business is not informed of the limitations to his authority. "The question in such cases is not so much what authority the agent had in point of fact, as it is what powers third persons had a right to suppose he possessed, judging from his acts and the acts of his principals." Lightbody *v.* No. American Ins. Co., 23 Wendell, 18. Thus, a general agent has authority to waive a condition in the policy that no insurance should be binding until actual payment of the premium. Sheldon *v.* The Atlantic Ins. Co., 26 N. Y. 460; Hotchkiss *v.* Germania Fire Ins. Co., 5 Hun, 91; Young *v.* Hartford Fire Ins. Co., 45 Ia. 377; Ins. Co. *v.* Norton, 96 U. S. 234; Agricultural Ins. Co. *v.* Montague, 38 Mich. 548; Bochen *v.* Williamsburg City Ins. Co., 35 N. Y. 131. He can also waive the formal proof of loss required by the policy, Lohnes *v.* Ins. Co., 121 Mass. 439; Badger *v.* Phœnix Ins. Co., 49 Wisc. 396; Little *v.* Phœnix Ins. Co., 123 Mass. 380; Lewis *v.* Monmouth Fire Ins. Co., 52 Maine, 492; Franklin Fire Ins. Co. *v.* Updegraff, 43 Pa. St. 350: or defects in the form of such proof of loss, Post *v.* Ætna Ins. Co., 43 Barb. 352; Peoria Ins. Co. *v.* Lewis, 18 Ill. 553; Rathbone *v.* City Fire Ins. Co., 31 Conn. 194; Great Western Ins. Co. *v.* Staaden, 26 Ill. 360: or the condition in the policy that the premises insured shall not remain vacant, St. Paul Ins. Co. *v.* Wells, 89 Ill. 314: but this, however, is denied in Walsh *v.* Hartford Fire Ins. Co., 73 N. Y. 5. He may also bind the company by a waiver of a clause in the policy requiring suits to be brought upon them within a limited time, Dohn *v.* Farmers' Ins. Co., 5 Lan-

losses on a policy, will include a power to refer the matter to arbitration.[1] So, an authority to sell and convey lands for cash, includes

sing, 275; Little *v.* Phœnix Ins. Co., 123 Mass. 380; Peoria Ins. Co. *v.* Whitehill, 25 Ill. 470; Grant *v.* Lexington Ins. Co., 5 Ind. 23: or of the condition that there shall be no other insurance, Schomer *v.* Hekla Fire Ins. Co., 50 Wisc. 575; American Ins. Co. *v.* Luttrel, 89 Ill. 314. He cannot, however, make an agreement with one who is indebted to an insurance company, by which his debt to the company is to be discharged by discharging the debt of the agent to him. Merchants' Mutual Ins. Co. *v.* Excelsior Ins. Co., 4 Mo. App. 578. But it has been held that a premium on a policy may be paid by an insurance agent out of money due from him to the policy holder, Chickering *v.* Globe Mut. Life Ins. Co., 116 Mass. 321; Woody *v.* Old Dom. Ins. Co., 31 Grat. 362: and he has authority to give permission to remove the property insured to another place, New England Ins. Co. *v.* Schettler, 38 Ill. 166.

Local Agent. — A local agent of an insurance company has a much more limited power. Bush *v.* Westchester Fire Ins. Co., 63 N. Y. 531; Reynolds *v.* Continental Ins. Co., 36 Mich. 131; Van Allen *v.* Farmers' Ins. Co., 64 N. Y. 469; Mersereau *v.* Phœnix Ins. Co., 66 N. Y. 274. Such limitation of his power, however, must be brought to the notice of the parties with whom he deals. Ins. Co. *v.* McCain, 96 U. S. 84; Rockford Ins. Co. *v.* Nelson, 65 Ill. 423; Camden Oil Co. *v.* Ohio Ins. Co., 14 Am. Law Rev. 456; Miller *v.* Phœnix Ins. Co., 27 Ia. 203; Ide *v.* Phœnix Ins. Co., 3 Biss. 333; Knox *v.* Lycoming Fire Ins. Co., 50 Wisc. 671; Patterson *v.* Ben Franklin Ins. Co., 81½ Pa. St. 454.

Agent of Assured. — An insurance company cannot by any clause in their policies convert their agent, after the receipt of the premium, into the agent of the assured. In the case of Ins. Co. *v.* Wilkinson, 13 Wallace, 222, in which a policy was sought to be avoided upon the ground of misrepresentation on the part of the assured, it appeared that the agent of the insurance company himself filled in the answers in the application for insurance from knowledge obtained by him from other sources. The insurance company claimed that he was then acting only as agent for the assured. Justice Miller, in delivering the opinion of the court affirming the judgment against the insurance company, said: "It is quite true that the reports of judicial decisions are filled with the efforts of insurance companies, by their counsel, to establish the doctrine that they can limit their responsibility for the acts of their agents to the simple receipt of the premium and delivery of the policy: the argument being that as to all other acts of the agent he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force, to the system of selling policies through agents, which we have described, would be a snare and a delusion; leading, as it has done in numerous instances, to the grossest frauds, of which the insurance companies receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction."

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[1] Goodson *v.* Brooke, 4 Camp. 163. [But see, *contra*, Huber *v.* Zimmerman, 21 Ala. 488.]

an authority to receive the purchase-money.[1] So, an authority to make and enter into contracts for the purchase of grain, has been held to include the power to modify or waive a contract made by the agent in respect to grain.[2] So, an authority given by vote to the treasurer of a corporation to hire money, not exceeding a fixed sum, and for a term not less than eight or more than twelve months "on such terms and conditions as he may think most conducive to the interests of the company," for the purpose of meeting certain drafts of the company, as they shall fall due, has been held to authorize the treasurer to raise money by drafts on one of the directors, payable to his own order, and indorsed by him, and to be charged by the acceptor to the company.[3] So, an authority to make contracts for the sale of lands, will authorize the agent to receive so much of the purchase-money as is to be paid in hand on the sale, as an incident to the power to sell.[4]

Planters' Ins. Co. *v.* Myers, 55 Miss. 479; Eilenberger *v.* Protective Mutual Fire Ins. Co., 89 Pa. St. 464; Hutchinson *v.* State Ins. Co., 53 Cal. 622; Flynn *v.* Equitable Life Ins. Co., 78 N. Y. 568; Woodbury Sav. Bk. *v.* Charter Oak Ins. Co., 31 Conn. 526. But see Wood *v.* Fireman's Ins. Co., 126 Mass. 316, *contra.*

The principal clerk of an insurance company, whose duty it is to attend generally to whatever "is transacted behind the counter," has been held to have authority to bind the company by parol contract, Cooke *v.* Etna Ins. Co., 7 Daly (N. Y.), 555: and the authority of sub-agents to waive conditions of a policy has been recognized in some cases, Davis *v.* Lamar Ins. Co., 18 Hun, 230; Grady *v.* American Central Ins. Co., 60 Mo. 116. But a sub-agent cannot sign a receipt to bind the company for money due from himself to the company, Neuendorff *v.* World Life Ins. Co., 69 N. Y. 389: nor can an agent of an insurance company, however broad his authority, receive an application from himself, and insure his own property so as to bind the company, Bentley *v.* Columbia Ins. Co., 91 Barb. 595. See also Markey *v.* Mutual Life Ins. Co., 118 Mass. 178; Putnam *v.* Home Ins. Co., 123 Mass. 324; State *v.* Farmer, 49 Wisc. 459; Stringham *v.* St. Nicholas Ins. Co., 4 Abb. App. Cas. 315; Whiting *v.* Mass. Mutual Life Ins. Co., 129 Mass. 240; Etna Ins. Co. *v.* Maguire, 51 Ill. 342; Commercial Ins. Co. *v.* Spankneble, 52 Ill. 53; Marks *v.* Hope Life Ins. Co., 117 Mass. 528; Northrup *v.* Germania Ins. Co., 48 Wisc. 420; Smith *v.* Commonwealth Ins. Co., 49 Wisc. 322; White *v.* Conn. Ins. Co., 120 Mass. 330; Winnesheik Ins. Co. *v.* Holzgrafe, 53 Ill. 516; Ætna Ins. Co. *v.* Olmstead, 21 Mich. 246; North American Fire Ins. Co. *v.* Throop, 22 Mich. 146; Security Ins. Co. *v.* Fay, 22 Mich. 467; Franklin *v.* Atlantic Fire Ins. Co., 42 Mo. 456; Combs *v.* Hannibal Savings & Ins. Co., 43 Mo. 148; Pierce *v.* Nashua Fire Ins. Co., 50 N. H. 297. — Ed.]

[1] Peck *v.* Harriot, 6 Serg. & R. 146; Hoskins *v.* Johnson, 5 Sneed, 469; [Rice *v.* Goffman, 56 Mo. 434].

[2] Anderson *v.* Coonley, 21 Wend. 279; [Owen *v.* Brockschmidt, 54 Mo. 285].

[3] Belknap *v.* Davis, 1 Appleton, 455.

[4] Yerby *v.* Grisby, 9 Leigh (Va.), 387; [Johnson *v.* McGruder, 15 Miss.

§ 59. Upon the same ground, an agent, who is employed to procure a note or bill to be discounted, may, unless expressly restricted,

365; Higgins *v.* Moore, 6 Bosw. 344; Goodale *v.* Wheeler, 11 N. H, 424; Lathrop *v.* Blake, 3 Foster, 46. So a power of attorney to sell land and dispose of the proceeds, authorizes the agent to execute a deed. Valentine *v.* Piper, 22 Pickering, 85. And where a power of attorney authorizes a party to sell or lease any real estate, *held*, that the word "sell" gives the party ample power to complete a sale, by making a deed of conveyance. Hemstreet *v.* Burdick, 90 Ill. 444; Jackson *v.* Hodges, 2 Tenn. Ch. 276. So a power to an agent to sell lands and execute deeds of conveyance necessary for the full and perfect transfer of the title, authorizes the agent to insert in the deed the usual covenants of warranty. Le Roy *v.* Beard, 8 How. 451. In this case Woodbury J., said: "This power of attorney is given *in extenso* in the case. It appears from its contents, that Le Roy, after authorizing Starr (the agent) to invest certain moneys in lands and real estate in some of the Western States and Territories of the United States, at the discretion of the said Starr, empowered him 'to contract for the sale of, and to sell, either in whole or in part, the lands and real estate so purchased by the said Starr,' and 'on such terms in all respects as the said Starr shall deem most advantageous.' Again, he was authorized to execute 'deeds of conveyance necessary for the full and perfect transfer of all our respective right, title,' &c., 'as sufficiently in all respects as we ourselves could do personally in the premises,' 'and generally, as the agent and attorney of the said Jacob Le Roy,' to sell 'on such terms in all respects as he may deem most eligible.' It would be difficult to select language stronger than this to justify the making of covenants without specifying them *eo nomine*. When this last is done, no question as to the extent of the power can arise, to be settled by any court. But when, as here, this last is not done, the extent of the power is to be settled by the language employed in the whole instrument (4 Moore, 448), aided by the situation of the parties and of the property, the usages of the country on such subjects, the acts of the parties themselves, and any other circumstance having a legal bearing and throwing light on the question. That the language above quoted from the power of attorney is sufficient to cover the execution of such a covenant would seem naturally to be inferred, first, from its leaving the *terms* of the sale to be in all respects as Starr shall deem most advantageous. 'Terms' is an expression applicable to the conveyances and covenants to be given, as much as to the amount of, and the time of paying, the consideration. Rogers *v.* Kneeland, 10 Wend. 218. To prevent misconception, this wide discretion is reiterated. The covenants, or security as to the title, would be likely to be among the terms agreed on, as they would influence the trade essentially, and in a new and unsettled country must be the chief reliance of the purchaser. To strengthen this view, the agent was also enabled to execute conveyances to transfer the title 'as sufficiently in all respects as we ourselves could do personally in the premises.' And it is manifest, that inserting certain covenants which would run with the land might transfer the title in some events more perfectly than it would pass without them; and that if present 'personally,' he could make such covenants, and would be likely to if requested, unless an intention existed to sell a defective title for a good one, and for the price of a good one. It is hardly to be presumed that any thing so censurable as this was contemplated. Again, his authority to sell, 'on such terms in all respects as he may deem most eligible,'

indorse it in the name of his employer, and bind him by that indorsement; for he may well be deemed as incidentally clothed with this

might well be meant to extend to a term or condition to make covenants of seisin or warranty, as without such he might not be able to make an eligible sale, and obtain nearly so large a price. Now all these expressions, united in the same instrument, would *primâ facie*, in common acceptation, seem designed to convey full powers to make covenants like these. And although a grant of powers is sometimes to be construed strictly (Com. Dig. *Poiar*, B. 1, and c. 6; 1 Bl. R. 283), yet it does not seem fit to fritter it away in a case like this, by very nice and metaphysical distinctions, when the general tenor of the whole instrument is in favor of what was done under the power, and when the grantor has reaped the benefit of it, by receiving a large price that otherwise would probably never have been paid. Nind *v.* Marshall, 1 Brod. & Bing. 319; 10 Wend. 219, 252. This he must refund when the title fails, or be accessory to what seems fraudulent. 1 J. J. Marsh. 292. Another circumstance in support of the intent of the parties to the power of attorney to make it broad enough to cover warranties, is their position or situation as disclosed in the instrument itself. Solly *v.* Forbes, 4 Moore, 448. Le Roy resided in New York, and Starr was to act as attorney in buying and selling lands in the 'Western States and Territories,' and this very sale was as remote as Milwaukie, in Wisconsin. For aught which appears, Le Roy, Beard, and Starr were all strangers there, and the true title to the soil little known to them, and hence they would expect to be required to give warranties when selling, and would be likely to demand them when buying. The usages of this country are believed, also, to be very uniform to insert covenants in deeds. In the case of The Lessee of Clarke *v.* Courtney, 5 Peters, 349, Justice Story says: 'This is the common course of conveyances;' and that in them 'covenants of title are usually inserted.' See also 6 Hill, 338. Now, if in this power of attorney no expression had been employed beyond giving an authority to sell and convey this land, saying nothing more extensive or more restrictive, there are cases which strongly sustain the doctrine, that, from usage as well as otherwise, a warranty by the agent was proper, and would be binding on the principal. It is true, that some of these cases relate to personal estate, and some perhaps should be confined to agents who have been long employed in a particular business, and derive their authority by parol, no less than by usage; and consequently may not be decisive by analogy to the present case. 3 D. & E. 757; Helyear *v.* Hawke, 5 Esp. 72; Pickering *v.* Busk, 15 East, 45; 2 Camp. N. P. 555; 6 Hill, 338; 4 D. & E. 177. So of some cases which relate to the quality and not the title of the property. Andrews *v.* Kneeland, 6 Cowen, 354; The Monte Allegre, 9 Wheat. 648; 6 Hill, 338. But where a power to sell or convey is given in writing, and not aided, as here, by language conferring a wide discretion, it still must be construed as intending to confer all the usual means, or sanction the usual manner, of performing what is intrusted to the agent. 10 Wend. 218; Howard *v.* Baillie, 2 H. Bl. 618; Story on Agency, p. 58; Dawson *v.* Lawly, 5 Esp. Ca. 65; Ekins *v.* Macklish, Ambler, 186; Salk. 283; Jeffrey *v.* Bigelow, 13 Wend. 521; 6 Cowen, 359. Nor is the power confined merely to 'usual modes and means,' but, whether the agency be special or general, the attorney may use appropriate modes and reasonable modes; such are considered within the scope of his authority. 6 Hill, 338; 2 Pick. 345; Bell on Com. L. 410; 2 Kent's Comm. 618; Vanada *v.* Hopkins, 1 J. J. Marsh.

authority, as a means to effectuate the discount.[1] So, a servant, intrusted to sell a horse, is clothed by implication (unless expressly forbidden) to make a warranty on the sale.[2] So, an agent or broker, having power to sell goods without any express restriction as to the mode, may sell by sample or with warranty.[3] So, an agent, employed to procure a bill or note to be discounted for his principal, may, if it be necessary or proper to accomplish the end, indorse the same in his own name, although not indorsed by his

287; Sandford *v.* Handy, 23 Wend. 268. We have already shown, that, under all the circumstances, a covenant or warranty here was not only usual, but appropriate and reasonable." The authority of an agent to make a contract for the sale of real estate need not be in writing; it may be oral. Brown *v.* Eaton, 21 Minn. 409. Thus where A. wrote to C. "I wish you to manage my property as you would your own. If a good opportunity offers to sell everything I have, I would be glad to sell. It may be parties will come into San Antonio who will be glad to purchase my gas stock and real estate." *Held*, that C. was thereby authorized to contract for the sale of the real estate, but not to convey it. Lyon *v.* Pollock, 99 U. S. 668. But a verbal authority to sell real estate has been held not to be sufficient to enable the agent to execute a contract to sell; and that it is in fact merely an authority to find a purchaser. Duffy *v.* Hobson, 40 Cal. 240; Treat *v.* De Celis, 41 Cal. 202; Hamer *v.* Sharp, L. R. 19 Eq. 108. But see Pringle *v.* Spaulding, 53 Barbour, 17; Ramsden *v.* Dyson, L. R. 1 H. L. 129. — Ed.].

[1] Fenn *v.* Harrison, 4 T. R. 177; Nickson *v.* Brohan, 10 Mod. 109; Hicks *v.* Hankin, 4 Esp. 116; [Merchants' Bank *v.* Central Bank, 1 Kelly, 418].

[2] Post, § 132; Fenn *v.* Harrison, 3 T. R. 757; Helyear *v.* Hawke, 5 Esp. 72; 3 Chitty, Com. & Manuf. 200, 201; Alexander *v.* Gibson, 2 Camp. 555; 1 Bell, Comm. 387, art. 412 (4th ed.); Id. pp. 477–479 (5th ed.). But see Seignor & Walmer's case, Godbolt, 360; Post, § 421, note. Whether a power to sell land includes an authority to convey it with covenants of general warranty, is a point upon which there are contradictory decisions. In Vanada *v.* Hopkins, 1 J. J. Marsh. 293, the Court of Appeals of Kentucky held the affirmative. In Nixon *v.* Hyserott, 5 John. 58, the Supreme Court of New York decided in the negative. The same court, in Gibson *v.* Colt, 7 John. 390, held, that a power to sell does not include a power to warrant the title; and that a master of a ship, authorized to sell the ship, had no authority to represent that she was a registered ship. [This last case was overruled in Nelson *v.* Cowing, 6 Hill. 336. But this right to warranty has been held to apply only to the servant of a professed horse dealer, Coleman *v.* Riches, 16 C. B. 104; Brady *v.* Todd, 9 C. B. N. S. 592; Udell *v.* Atherton, 7 H. & N. 172; Howard *v.* Sheward, L. R. 2 C. P. 148; and in this last case it was held that he had this implied authority to bind his master by a warranty, even though he had express orders not to warrant; and see Hunter *v.* Jameson, 6 Iredell, 252; Woodford *v.* McClenahan, 4 Gilman, 85; Skinner *v.* Gunn, 9 Porter, 305; Bradford *v.* Bush, 10 Ala. 386; Cocke *v.* Campbell, 13 Ala. 286; Ezell *v.* Franklin, 2 Sneed, 236; Franklin *v.* Ezell, 1 Sneed, 497; Peters *v.* Farnsworth, 15 Vt. 155; Taggart *v.* Stanberry, 2 McLean, 543. — Ed.]

[3] Andrews *v.* Kneeland, 6 Cowen, 354. But see Nixon *v.* Hyserott, 5 John. 58; Gibson *v.* Colt, 7 John. 390; [Randall *v.* Kehlor, 60 Me. 37].

principal; and in such a case he will be entitled to be indemnified by his employer.[1]

§ 60. And not only are the means necessary and proper for the accomplishment of the end included in the authority, but also all the various means which are justified or allowed by the usages of trade.[2] Thus, if an agent is authorized to sell goods, this will be construed to authorize the sale to be made upon credit, as well as for cash, if this course is justified by the usages of trade, and the credit is not beyond the usual period; for it is presumed, that the principal intends to clothe his agent with the power of resorting to all the customary means to accomplish the sale, unless he expressly restricts him.[3] In other words, he is presumed to authorize him to sell in the usual manner and only in the usual manner, in which goods or things of that sort are sold.[4]

[1] *Ex parte* Robinson, 1 Buck, 113; Bayley on Bills (5th ed.), ch. 2, § 7; [Stainback *v.* Read, 11 Grat. 281].

[2] Ekins *v.* Macklish, Ambler, 184–186; Post, §§ 77, 98, 101–106; [Mollett *v.* Robinson, L. R. 5 C. P. 646; L. R. 7 C. P. 84].

[3] Anon. 12 Mod. 514; Scott *v.* Surman, Willes, 407; Houghton *v.* Matthews, 3 Bos. & Pull. 489; Newsome *v.* Thornton, 6 East, 17; 2 Kent, Comm. Lect. 41, pp. 622, 623 (4th ed.); McKinstry *v.* Pearsall, 3 John. 319; Van Allen *v.* Vanderpool, 6 John. 69; Goodenow *v.* Tyler, 7 Mass. 36; Clark *v.* Van Northwick, 1 Pick. 343; Laussatt *v.* Lippincott, 6 Serg. & R. 386; Gerbier *v.* Emery, 2 Wash. Cir. 413; Post, §§ 108, 226; Greeley *v.* Bartlett, 1 Greenl. 172; Forrestier *v.* Boardman, 1 Story, 43.

[4] Wiltshire *v.* Sims, 1 Camp. 258; 2 Kent, Comm. Lect. 41, pp. 622, 623 (4th ed.); 3 Chitty on Com. & Manuf. 205; Post, § 110; Fisk *v.* Offit, 15 Martin, 555; Reano *v.* Magee, 11 Martin, 637. [But see James *v.* McCredie, 1 Bay, 294; Delafield *v.* Illinois, 26 Wendell, 223; Ives *v.* Davenport, 3 Hill, 374. An agent's authority extends to all acts connected with the subject and purpose of his agency; as where an agent was employed to sell a sewing-machine, it was held that a right also to warrant the machine was given to the agent. Pitsinowsky *v.* Beardsley, 37 Iowa, 9. But a letter of his principal to the agent, stating that he proposed to place his goods at a certain price after a certain date, was held to give the agent no authority to guarantee that his principal would not sell for a less price. Anderson *v.* Bruner, 112 Mass. 14; Hornish *v.* Peck, 53 Iowa, 157; White *v.* Fuller, 67 Barbour, 267; Randall *v.* Kehlor, 60 Me. 37. So a general selling agent has no implied authority to bind his principals by a warranty that flour sold by him on their account will keep sweet during a sea voyage. Upton *v.* Suffolk County Mills, 11 Cush. 586. Metcalf, J., there said: "The single question which we have examined is, what is the extent of the implied authority of a general selling agent? The answer is, it is the same as that of other general agents. And it is an elementary principle that an agent, employed generally to do any act, is authorized to do it only in the usual way of business. Smith's Merc. Law (Am. ed. 1847), 105 (5th ed.), 129; Woolrich on Com. & Merc. Law, 319; Jones *v.* Warner, 11 Conn. 48. A general agent is not, by virtue of his commission, permitted to depart from the

§ 61. The same doctrine is recognized in the civil law; for by that law agents might do whatsoever is comprehended within their letter of procuration and the intentions of the principal, deducible therefrom, and whatever naturally follows from the authority given to them, or is necessary for the execution of it.[1] And this, especially, was deemed to belong to a procurator, having what was called a liberal administration. "Procurator, cui generaliter libera administratio rerum commissa est, potest exigere, aliud pro alio permutare."[2] Thus, an agent appointed to demand personal property, might institute an action therefor. "Ad rem mobilem petendam datus procurator, ad exhibendum recte aget."[3] Domat has expounded the true doctrine of the civil law in expressive, but at the same time in exact terms. "If," says he, "the order or power given marks precisely what is to be done, he, who accepts and executes it, ought to keep close to what is prescribed in it. And if the order or power be indefinite, he may set such bounds to it, or give to it such extent, as may reasonably be presumed to be agreeable to the intention of the person, who makes the order, or bestows the power; whether it be with regard to the thing itself, which is to be done, or the way of doing it."[4] "Igitur commodis-

usual manner of effecting what he is employed to effect. 3 Chit. Law of Com. & Manuf. 199. When one authorizes another to sell goods, he is presumed to authorize him to sell in the usual manner, and only in the usual manner, in which goods or things of that sort are sold. Story on Agency, § 60. See also Shaw *v.* Stone, 1 Cush. 228. The usage of the business in which a general agent is employed furnishes the rule by which his authority is measured. Hence, a general selling agent has authority to sell on credit, and to warrant the soundness of the article sold, when such is the usage. Goodenow *v.* Tyler, 7 Mass. 36; Alexander *v.* Gibson, 2 Camp. 555; Nelson *v.* Cowing, 6 Hill, 336; 2 Kent, Comm. (6th ed.) 622; Russell on Factors, 58; Smith on Master and Servant, 128, 129. But as stocks and goods sent to auction are not usually sold on credit, a stock-broker or auctioneer has no authority so to sell them, unless he has the owner's express direction or consent. Wiltshire *v.* Sims, 1 Camp. 258; 3 Chit. Law of Com. and Manuf. 205; 1 Bell, Comm. 388. And it was said by Mr. Justice Thompson (9 Wheat. 647), that auctioneers have only authority to sell, and are not to warrant unless specially instructed so to do.

"As there is no evidence nor suggestion of a usage to sell flour with the hazardous warranty that it shall keep sweet during a sea voyage, in which it must twice cross the equator, we deem it quite clear that nothing short of an express authority, conferred on the agent by the defendants, would empower him to bind them by such a warranty. See Cox *v.* Midland Counties Railway Co., 3 Welsb. Hurlst. & Gord. 268." — Ed.]

[1] Domat, B. 1, tit. 15, § 3, art. 10, by Strahan.

[2] Dig. Lib. 3, tit. 3, l. 58; Pothier, Pand. Lib. 3, tit. 3, n. 3.

[3] Dig. Lib. 3, tit. 3, l. 56, 57; Pothier, Pand. Lib. 3, tit. 3, n. 29.

[4] 1 Domat, B. 1, tit. 15, § 3, art. 3, by Strahan; [Wicks *v.* Hatch, 62 N.Y. 535].

sime illa forma in mandatis servanda est, ut quotiens certum mandatum sit, recedi a formâ non debeat; at quotiens incertum vel plurium causarum, tunc licet aliis præstationibus exsoluta sit causa mandati, quam quæ ipso mandato inerant, si tamen hoc mandatori expedierit, mandati erit actio."[1]

§ 62. On the other hand, language, however general in its form, when used in connection with a particular subject matter, will be presumed (as we have already seen[2]) to be used in subordination to that matter; and therefore it is to be construed and limited accordingly. And it will make no difference in the construction, that this general language is found in very formal instruments, such as a letter of attorney. Thus, where a power of attorney authorized an agent "to ask, demand, and receive from the East India Company, or whom it should, or might concern, all money that might become due to the principal, on any account whatsoever, and to transact all business,"[3] and on non-payment, to use all lawful means for the recovery, and, on payment, to give proper receipts and discharges, with power to appoint substitutes, and giving his (the principal's) full power and authority in the premises, with the usual clause of ratification; it was held, that the words "to transact all business," did not authorize the agent to indorse an East India bill, received under the letter of attorney in the name of the principal, and to procure a discount thereon, on such indorsement; for the words "all business" must be construed to be limited to all business necessary for the receipt of the money.

§ 63. So, a letter of attorney to receive from the commissioners of the navy, or whom it may concern, all salary, wages, &c., and all other money due to the principal, with a general power to receive all demands from all other persons, to appoint substitutes, and to make due acquittances and discharges, has been held not to authorize the agent to negotiate any bills received in payment, or to indorse them in his own name, even although there was evidence of a usage among agents of the like sort to negotiate such bills; for the authority conferred did not include any such power of negotiation: and parol evidence is not admissible to control or enlarge the language of a written instrument.[4]

[1] Dig. Lib. 17, tit. 1, l. 46; Pothier, Pand. Lib. 17, tit. 1, n. 45.

[2] Ante, § 21.

[3] Hay *v.* Goldsmidt, cited 1 Taunt. 349, 350; Murray *v.* East India Co. 5 B. & Ald. 204, 210, 211; Esdaile *v.* La Nauze, 1 Y. & Col. 394; [Bank of Bengal *v.* McLeod, 7 Moore, P. C. 35].

[4] Hogg *v.* Snaith, 1 Taunt. 347; Murray *v.* East India Co. 5 B. & Ald. 204,

§ 63 *a*. So, a letter of attorney empowering an agent to negotiate, compromise, adjust, determine, settle, and arrange all differences and disputes between the principal and all persons whatever, and to execute and sign in the name of the principal any release, covenant, or conveyance of any part of the principal's estate, and to give and receive discharges, receipts, &c., has been held not to authorize the agent to confess a judgment in the name of the principal.[1]

§ 64. So, a letter of attorney given by an executrix, authorizing an agent to receive all sums of money due to the testator, or to her as executrix, to adjust all accounts and differences, to submit the same to arbitration, to execute assignments, receipts, and releases, to pay all debts due by her as executrix, in due course of law, and generally to do all acts for receiving debts, and discharging the powers given by the letter of attorney, with full power "to do and act touching and concerning all or any of the premises, as effectually to all intents, constructions, and purposes whatsoever, as she as executrix could," has been held not to authorize the agent to accept bills of exchange to charge her in her own right for the debts of the testator.[2]

210, 211. See Ekins *v.* Macklish, Ambler, 184, 185. It is said by Mr. Lloyd, in his notes to Paley on Agency (3d ed.), p. 198, that "the construction of a written instrument, whether mercantile or otherwise, is for the court, and not for the jury. The court, however, may, where the construction is doubtful, receive evidence in aid of its judgment." Lord Hardwicke, in Ekins *v.* Macklish, Ambler, 184, 185, thought that the evidence of the custom among merchants was admissible, to explain a letter, at least, if it could not be well otherwise understood, in courts of equity, even if not admissible in courts of law. See also Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326; Morrell *v.* Frith, 3 Mees. & Wels. 402; Neilson *v.* Harford, 8 Mees. & Wels. 806, 823; Kean *v.* Davis, Spencer, 426; [Holtsinger *v.* National Corn Ex. Bank, 37 How. Pr. R. 203].

[1] Lagow *v.* Patterson, 1 Blackford, 252. [A power of attorney to sue for a specific debt carries with it the power to make the suit effective by attachment, De Poret *v.* Gusman, 30 La. Ann. 930: but a letter of attorney, authorizing an agent to collect a debt, does not empower him to give a discharge upon receipt of the debtor's note, Corning *v.* Strong, 1 Carter, 329; Kirk *v.* Hyatt, 2 Carter, 322; Ward *v.* Evans, 2 Lord Raymond, 928; Sykes *v.* Giles, 5 M. & W. 645; Miller *v.* Edmondstone, 8 Blackf. 291. Nor does the power to settle a claim for damages authorize an agent to give a discharge without payment. Patterson *v.* Moore, 35 Pa. St. 69; Melvin *v.* Lamar Ins. Co., 80 Ill. 446. So an agent to deposit money for another in a savings bank is not authorized to receive a debt due the depositor, Butman *v.* Bacon, 8 Allen, 25: nor can an agent who holds a note for collection only, sell it, Smith *v.* Johnson, 71 Mo. 382. — Ed.]

[2] Gardner *v.* Baillie, 6 T. R. 591. But see Howard *v.* Baillie, 2 H. Bl. 628, which seems *contra*.

§ 65. So, a power of attorney to secure, demand, and sue for all sums of money then due, or thereafter to become due, to the principal in certain countries, and to discharge and compound the same, to execute deeds of land then, or thereafter, owned by the principal, in a particular state, "and to accomplish, at his discretion, a complete adjustment of all the concerns of the principal, in the State of New York, and to do any and every act in his name, which he would do in person," has been held not to authorize the agent to give a promissory note in the name of the principal, upon the ground, that making an adjustment of his concerns did not include any incidental authority to give the note, for the authority, notwithstanding these general words, was to be construed to be limited to the business referred to in the preceding clauses, and not include a general authority to adjust all the other concerns of the principal.[1]

§ 66. So, a letter of attorney, given to certain persons, jointly and severally, to sue for and get in moneys and goods, to take proceedings and bring actions, to enforce payment of moneys due, to defend actions, settle accounts, submit disputes to arbitration, sign receipts for money, accept compositions, "indorse, negotiate, and discount, or acquit and discharge bills of exchange, promissory notes, or other negotiable securities, which were or should be payable to the principal, and should need and require his indorsement;" to sell his ships, execute bills of sale, hire on freight, effect insurances, "buy, sell, barter, exchange, and import all goods, wares, and merchandise; and to trade and deal in the same, in such manner as should be deemed most for his interest; and generally to make, do, execute, transact, perform, and accomplish all and singular such further, and other acts, deeds, matters, and things, as should be requisite, expedient, and advisable to be done in and about the premises, and all other his affairs and concerns, as he might or could do, if personally acting therein;" has been held not to authorize the agent to accept a bill in the name of the principal; es-

[1] Rossiter *v.* Rossiter, 8 Wend. 494. This case certainly stands upon very nice principles of construction; for giving the note might be the only effectual means of adjusting the principal's concerns if the power was applicable to all the principal's concerns in the State of New York, instead of being limited to the preceding special authorizations. [See Harper *v.* Godsell, L. R. 5 Q. B. 422; Taylor *v.* Robinson, 14 Cal. 399; Hefferman *v.* Adams, 7 Watts, 716; Wood *v.* McCain, 7 Ala. 800; Pollock *v.* Cohen, 32 Ohio St. 514; City Bank of Macon *v.* Kent, 57 Ga. 283.]

pecially if drawn in relation to concerns in which he had a partnership interest only. The language of the instrument, although general, was thought rather to import a power to take for the defendant, than to bind him; and the acts were to be done for the defendant singly. An express power was given to indorse, but none to accept, bills; so that if any inference was to be drawn from the omission, it was an inference against, and not in favor of, any intention to confer the latter. Such instruments do not give general powers, speaking at large; but only where they are necessary to carry the purposes of the special powers into effect.[1]

§ 67. For the same reason, a power of attorney by a principal to another person, "for him, and on his behalf, to pay and accept such bill or bills of exchange as should be drawn or charged on him by his agents or correspondents, as occasion should require; and generally to do, negotiate, and transact the affairs and business of him (the principal) during his absence, as fully and effectually as if he were present and acting therein," has been held not to authorize the agent to accept bills drawn upon him upon account of a partnership, in which the principal was a partner; but only to accept bills drawn on him upon his individual account. The language of the instrument conferred an authority to accept bills for the principal, and on his behalf. No such power was requisite as to partnership transactions; for the other partners might bind the firm by their acceptance; and, therefore the words of the instrument might well be confined to their obvious meaning; namely, an authority to accept in those cases where it was right for the principal to accept in his individual capacity.[2]

[1] Atwood *v.* Munnings, 7 B. & Cressw. 278; [Feldman *v.* Beier, 78 N. Y. 293].

[2] Atwood *v.* Munnings, 7 B. & Cressw. 278, 283, 284. The authority conferred by written instruments of agency of this sort, is to be carefully distinguished from a class of cases closely resembling them, that is, powers of appointment created by deeds, or last wills. In this class of cases courts of equity have indulged themselves in a very liberal interpretation of the words, and have held many executions of such powers valid, which would perhaps scarcely be allowed in the construction of letters of attorney. Thus, a power to appoint land has been held to include a power to charge it with a sum of money for the same objects as the appointment. Roberts *v.* Dixall, 2 Eq. Cas. Abridg. 668; Thwaytes *v.* Dye, 2 Vern. 80. So a power to charge has been held to authorize a sale, and appointing the money to the objects of the charge. Long *v.* Long, 5 Ves. 445; Kenworthy *v.* Bate, 6 Ves. 793. So a power to raise money out of an estate, has been held to authorize a sale thereof. Bateman *v.* Bateman, 1 Atk. 421; 2 Story, Eq. Jurisp. §§ 1063, 1064. So a power

§ 68. Indeed, formal instruments of this sort are ordinarily subjected to a strict interpretation, and the authority is never extended beyond that, which is given in terms, or which is necessary and proper for carrying the authority so given into full effect.[1] Thus, a power of attorney to sell, assign, and transfer stock, will not include a power to pledge it for the agent's own debt.[2] So, a power of attorney, given by a mill company to their agent to manufacture logs into lumber at their mills, and transport them to market, and sell and dispose thereof for the company's benefit, will not authorize the agent, without the knowledge of the directors of the company, to deliver over the lumber at the company's mills in payment of securities given by the agent, on behalf of the company, in the course of his agency.[3] So, a power to bargain and sell land will not include an authority to grant a license to the purchaser, previous to a conveyance, to enter and cut timber on the land, although done *bonâ fide* with a view to effect the sale.[4]

§ 69. In written instruments also of a less formal character, the like rule of interpretation generally prevails; and they are never

to pay debts out of rents and profits, has been held to authorize a sale or mortgage of the estate. Bootle *v.* Blundell, 1 Meriv. 193, 239; 2 Story, Eq. Jurisp. §§ 1064, 1064 a. In Williams *v.* Woodward, 2 Wend. 487, it was held that a power of attorney to sell an estate included a power to make a lease for life, which was a lesser estate. And the court greatly relied on cases arising under powers of appointment. It may, however, deserve consideration, whether the analogy can be safely relied on. See Hubbard *v.* Elmer, 7 Wend. 446.

[1] Atwood *v.* Munnings, 7 B. & Cressw. 278, 283, 284; Ducarrey *v.* Gill, 1 Mood. & Malk. 450; Withington *v.* Herring, 5 Bing. 442; [Wood *v.* Goodridge, 6 Cush. 117; Chase *v.* Dana, 44 Ill. 262].

[2] De Bouchout *v.* Goldsmid, 5 Ves. jr. 211; Post, § 78.

[3] Lombard *v.* Winslow, 1 Kerr (New Bruns.), 327. [And see Hazeltine *v.* Miller, 44 Me. 177.]

[4] Hubbard *v.* Elmer, 7 Wend. 446. [But a power of attorney to sell land does not include authority to mortgage it. Wood *v.* Goodridge, 6 Cush. 117. Nor is the agent authorized to give his principal's note with a mortgage so as to render him personally liable, where a power of attorney authorizes him to mortgage land, for the purpose of procuring money thereon. Mylius *v.* Cope, 23 Kan. 617. Nor do letters of attorney "to attend to the business of the principal" authorize the agent to sell real estate, or personal property, unless as a means necessary and proper to carry on the business of his principal. Coquillard *v.* French, 19 Ind. 274. See Hodge *v.* Combs, 1 Black. 192; De Rutte *v.* Muldron, 16 Cal. 505; Mott *v.* Smith, 16 Cal. 533. But authority given to an agent to open a new channel for the purpose of turning the course of a stream, will include authority to erect a dam or breakwater across the old bed of the stream. Barns *v.* City of Hannibal, 71 Mo. 449. See Tharp *v.* Brenneman, 41 Ia. 251; Clark *v.* Field, 42 Mich. 342; Adrian *v.* Lane, 13 S. C. 183. — Ed.]

interpreted to authorize acts not obviously within the scope of the particular matter to which they refer. Thus, where, upon the dissolution of a partnership, notice was published by the partners, that all demands upon the firm would be paid by a particular partner, "who is empowered to receive and discharge all debts due to the said copartnership;" it was held that this did not authorize the partner, after the dissolution, to indorse a bill of exchange in the name of the firm, although drawn by him in that name, and accepted by a debtor to the firm.[1] So, the resident agent of a mining company, who is appointed by the directors to manage the mine, has not in virtue of such an agency, an implied authority from the shareholders to borrow money upon their credit in order to pay the arrearages of wages due to the laborers, however urgent the necessity may be, in order to avoid a distress upon the materials of the mine therefor.[2]

[1] Kilgour *v.* Finlyson, 1 H. Bl. 156.

[2] Hawtyne *v.* Bourne, 7 Mees. & Wels. 595. Mr. Baron Parke, in delivering his opinion on the case, said: "This is an action brought by the plaintiffs, who are bankers, to recover from the defendant, as one of the proprietors of the Trewolves Mine (a mine carried on in the ordinary way), the balance of a sum of £400, advanced by them to the agent appointed by the company of proprietors for the management of the mine. Now, the extent of the authority conferred upon the agent by his appointment was this only, — that he should conduct and carry on the affairs of the mine in the usual manner. There is no proof of express authority to borrow money from bankers for that purpose, or that it was necessary in the ordinary course of the undertaking; and certainly no such authority could be assumed. There are two grounds, on which it is said the defendant may be made responsible: first, on that of a special authority given to the agent to borrow money; and, secondly, on the assumed principle, that every owner, who appoints an agent for the management of his property, must be taken to have given him authority to borrow money in cases of absolute necessity. There certainly was, in the present case, some evidence, from which a jury might have inferred that a power to borrow money, for the purposes of the mine, had been expressly given to the agent; but that evidence does not appear to have been left to the jury, and therefore the verdict cannot be supported on the first ground. Then, as to the second ground, it appears that the learned judge told the jury, that they might infer an authority in the agent, not only to conduct the general business of the mine, but also, in cases of necessity, to raise money for that purpose. I am not aware, that any authority is to be found in our law to support this proposition. No such power exists, except in the cases alluded to in the argument, of the master of a ship, and of the acceptor of a bill of exchange for the honor of the drawer. The latter derives its existence from the law of merchants; and in the former case the law, which generally provides for ordinary events, and not for cases which are of a rare occurrence, considers, how likely and frequent are accidents at sea, when it may be necessary, in order to have the vessel repaired, or to provide the means of continuing the voyage, to pledge the credit of her owners; and therefore it is, that the law invests the master with power to raise money,

So, an agent, who is authorized to draw and indorse notes, and to draw, indorse, and accept bills of exchange, can act under such authority only to the extent of his principal's business, and is not authorized to draw, indorse, or accept them for the accommodation of mere strangers.[1]

§ 70. Principles very similar may be traced back to the Roman law; for in that law, where the authority was express or special, the agent was bound to act within it; and where it was of a more general nature, still the agent could not bind the principal beyond the manifest scope of the objects to be accomplished by it. "Igitur commodissime illa forma in mandatis servanda est, ut quotiens

and, by an instrument of hypothecation, to pledge the ship itself if necessary. If that case be analogous to this, it follows, that the agent had power not only to borrow money, but, in the event of security being required, to mortgage the mine itself. The authority of the master of a ship rests upon the peculiar character of his office, and affords no analogy to the case of an ordinary agent. I am therefore of opinion that the agent of this mine had not the authority contended for." Mr. Baron Alderson used language equally expressive. [Thus the station master of a railroad company has no implied authority to bind the company by contracts for surgical attendance upon injured passengers, Cox *v.* Midland Counties R. Co., 3 Exch. 268: nor can an engineer bind the railroad company by contracts made by him for the company, Gardner *v.* Boston & Maine R. Co., 70 Me. 181: nor can the conductor of a horse-car bind the corporation by which he is employed, by agreeing to give a free passage to a passenger, Wakefield *v.* So. Boston R. Co., 117 Mass. 544: nor can an agent specially authorized to obtain surgical aid for a passenger, employ a physician to attend to the coachman, who was driving the stage without the knowledge of the company, Shriven *v.* Stephens, 12 Pa. St. 258: nor can an agent employed by a railroad company to solicit passengers to patronize the road, bind the company by his contracts to receive or transport freight, Taylor *v.* Chic. & N. W. R. Co., 74 Ill. 86. But a railroad inspector, a part of whose duty it is to attend to accidents, and look after the injured, has authority to take the sufferers to a public house to be cared for, and to bind the company for the price of such care. Langan *v.* Great Western R. Co., 26 L. T. R. N. S. 577. See Reed *v.* Ashburnham R. Co., 120 Mass. 43. — ED.]

[1] Wallace *v.* Branch Bank of Mobile, 1 Ala. N. S. 565; North River Bank *v.* Aymar, 3 Hill, 262; Stainer *v.* Tysen, 3 Hill, 279; Post, § 73. [Nor can he indorse notes for the accommodation of himself. Stainback *v.* Bank of Virginia, 11 Grat. 269. Nor is the agent, when authorized to use or sign the principal's name for the purpose of obtaining accommodation, empowered to execute any instrument for that purpose except a commercial note. First Nat. Bank *v.* Gay, 63 Mo. 33; Gulick *v.* Grover, 33 N. J. L. 463. Nor has a general agent, although authorized to transact all the business of his principal, any authority to bind his principal as surety on mercantile paper. Bank of Hamburg *v.* Johnson, 3 Rich. 42. And to authorize the general agent of a corporation to make or indorse promissory notes in the name of the corporation, such power must be expressly stated: he cannot exercise it under general words in a power of attorney. Lawrence *v.* Gibhard, 41 Barb. 575; Lemon *v.* Hornsby, 63 Ga. 271. — ED.]

certum mandatum sit, recedi a forma non debeat.[1] Diligenter fines mandati custodiendi sunt; nam qui excessit, aliud quid facere videtur.[2] Conditio autem præpositionis servanda est." [3]

§ 71. The same principles were applied to the interpretation of words, conferring a general authority as to one thing, or as to many things. Thus, where a general authority of simple administration or management of the property of the principal was conferred upon an agent, it was held not to entitle the agent to alienate any property, except that which was of a perishable nature: "procurator totorum bonorum, cui res administrandæ mandatæ sunt, res domini neque mobiles vel immobiles, neque servus sine speciali domini mandatu alienare potest; nisi fructus aut alias res, quæ facile corrumpi possunt." [4] So, where a person was appointed as an agent to superintend a farm, he was held to possess no power to sell it, or the things belonging to it: "procuratorem vel actorem prædii, si non specialiter distrahendi mandatum accepit, jus rerum domini vendendi non habere, certum ac manifestum est." [5] So, a general mandate was construed not to authorize a final settlement of an agreement by compromise: "mandato generali non contineri etiam transactionem decidendi causa interpositam." [6] Where, however, a liberal or absolute administration of the affairs of the principal was conferred generally on the agent, a more liberal rule of construction prevailed; for in such cases he was authorized to collect and to pay debts, and to exchange one thing for another: "procurator, cui generaliter libera administratio rerum commissa est, potest exigere; aliud pro alio permutare. Sed et id quoque ei mandari videtur ut solvat creditoribus." [7] The same doctrine is pithily expressed in the Scottish law, by Lord Stair, who says: "Where in general mandates some things are specially expressed, the generality is not extended to cases of greater importance than those expressed." [8]

[1] Dig. Lib. 17, tit. 1, l. 46; 1 Domat, B. 1, tit. 15, § 1, art. 8.

[2] Dig. Lib. 17, tit. 1, l. 5; Pothier, Pand. Lib. 17, tit. 1, n. 41; 1 Domat, B. 1, tit. 15, § 3, art. 3; Ante, § 43; Post, §§ 87, 88, 174.

[3] Dig. Lib. 14, tit. 3, l. 11, § 5; Ante, § 43.

[4] Dig. Lib. 3, tit. 3, l. 63; Pothier, Pand. Lib. 3, tit. 3, n. 4; 1 Domat, B. 1, tit. 15, § 3, art. 10, 11.

[5] Cod. Lib. 2, tit. 13, l. 16; Pothier, Pand. Lib. 3, tit. 3, n. 4.

[6] Dig. Lib. 3, tit. 3, l. 60; Pothier, Pand. Lib. 3. tit. 4, n. 5; 1 Stair, Inst. B. 1, tit. 12, § 12, by Brodie; Ersk. Inst. B. 3, tit. 3, § 39; 1 Domat, B. 1, tit. 15, § 3, art. 10, 11.

[7] Dig. Lib. 3, tit. 3, l. 58, 59; Pothier, Pand. Lib. 3, tit. 3, n. 8; 1 Stair, Inst. B. 1, tit. 12, § 15, by Brodie.

[8] 1 Stair, Inst. by Brodie, B. 1, tit. 12, § 15; Ersk. Inst. B. 3, tit. 3, § 39.

§ 72. Wherever an authority purports to be derived from a written instrument, or the agent expressly signs the contract, or other paper, introduced with the words "by procuration;" as, if he signs "by procuration of A. B. (his principal) C. D. (the agent);" in such a case, the other party is bound to take notice, that there is a written instrument of procuration; and he ought to call for and examine the instrument itself, to see, whether it justifies the act of the agent. For, under such circumstances, it is but a reasonable precaution and exercise of prudence, and he is put upon inquiry.[1] And if, from his omission to call for or to examine the instrument, he should encounter a loss from the defective authority of the agent, it is properly attributable to his own fault, since he must know, that he has no other security than his reliance upon the good faith and credit of the agent.[2] It has been said by a learned judge, that the

[1] [Towle *v.* Leavitt, 3 Foster, 360; Alexander *v.* Mackenzie, 6 C. B. 767; Equit. Life Ass. So. *v.* Poe, 53 Md. 28; Stagg *v.* Elliott, 12 C. B. N. S. 373.]

[2] Atwood *v.* Munnings, 7 B. & Cressw. 278, 283–285; Withington *v.* Herring, 5 Bing. 442; Schimmelpennich *v.* Bayard, 1 Peters, 264; Stainer *v.* Tysen, 3 Hill, 279; North River Bank *v.* Aymar, 3 Hill, 262; Munn *v.* Commission Company, 15 John. 44; Andrews *v.* Kneeland, 6 Cowen, 354; Rossiter *v.* Rossiter, 8 Wend. 498, 499. The true bearing and limitations of the doctrine stated in Atwood *v.* Munnings, 7 B. & Cressw. 278, were much discussed in North River Bank *v.* Aymar, 3 Hill, 262, 270, 271, where a letter of attorney authorized the attorney to draw and indorse notes in the name of the principal, and to manage and negotiate any business, &c.; and the question was, whether persons taking such notes were bound not only to examine the procuration, but also to ascertain whether the notes were drawn or indorsed in the business, and for the use of the principal or not. The court held that they were not. Mr. Justice Cowen, upon that occasion, in delivering the opinion of the court, said: "The only adjudged case cited on the argument for the defendants in error, giving color to the idea, that the appointee must look behind the power, is Atwood *v.* Munnings, 7 B. & Cressw. 278. The power in that case was extremely limited, being tied up to the acceptance of bills particularly described. The words were, 'For me, and on my behalf, to pay and accept such bill or bills, &c., as shall be drawn, &c., on me by my *agents or correspondents, as occasion shall require.*' The bill there in question was drawn by Burleigh, a partner of the defendant, for the benefit of the joint concern; and, as the court held, he was neither a correspondent nor agent within the meaning of the power. There was, indeed, no need of giving effect to the bill by an acceptance under the power; for Burleigh was authorized to bind the defendant as his partner. The court held, that, as the power described the persons whose names must appear upon the bill, the authority was overstepped if the names were not there. In other words, a power to accept a bill drawn by an agent, did not extend to a bill drawn by one who was not an agent. Here the power contains no such limitation. The case cited accords with one of the most familiar rules for the construction of powers, but it does not apply. If the principal will describe the particular condition on which a bill shall be accepted, however idle, even

same principle prevails in the civil law; for if a person is acting *ex mandato,* those dealing with him must look to his mandate.[1]

to the writing of it with a steel pen, it must be fulfilled. There it was to be drawn by a correspondent or agent; and not being so drawn, but by one who was a principal, the condition failed. The appointee was admonished to see at his peril, that all the prescribed requisites were combined. The principal would not trust the attorney, even to judge of the parties. There was another clause in the power, which, as Bayley, J., inclined to think, also amounted to a condition. The bills were to be drawn *as occasion should require.* It was not necessary to say, that the plaintiff was bound on this clause to see the occasion did require; and a majority of the judges, who spoke to the question (Holroyd and Littledale, JJ.), did not say so. The two reporters did not entirely agree. In 7 B. & Cressw. both of the two latter judges are made to discuss the question: in 1 Mann. & Ryl. Littledale, J., is represented as having given a naked assent to what Holroyd, J., said; but in neither does it appear that any but Bayley, J., considered the actual occasion of accepting as a condition. The report of his argument is substantially the same in both, though in B. & Cressw. he seems to have thought it sufficient to have called for the letter of advice. Littledale, J., in B. & Cressw. thought the words, *as occasion shall require,* did not vary the question; and that the power should be read without them. This was conceding the ground taken by counsel, that the attorney had a discretionary power to judge of the occasion. I have looked into some authoritative books on agency to find how this case has been considered by learned writers who had studied the subject. It is introduced into the late edition of Paley on Agency (p. 192), by a simple statement of the case, with the opinion of Bayley, J.; or rather, as illustrating the general remark, that all written powers are to receive a strict interpretation, the authority never being extended beyond that which is given in terms, or is absolutely necessary for carrying the authority into effect. Judge Story mentions the case several times in his work on Agency (pp. 22, 65–67, 69), but evidently considers it as holding no more than that the appointee is bound to see the proper parties introduced. He is evidently of opinion, with Littledale, J., that the words 'as occasion shall require,' were no more than what the nature of such a power would imply without them; namely, an authority in the agent to govern himself according to the emergencies of business. The necessity mentioned by Mr. Justice Bayley of calling for the letter of advice, was, I think, virtually denied by what Best, C. J., and the whole court afterwards, held as to letters of instruction in Withington *v.* Herring, 5 Bing. 442; 3 Moore & Payne, 30, s. c. Such letters are often confidential between the parties, and contain matters not fit to be divulged. He said all that was necessary for the plaintiffs to inquire for, was the authority. The case of Atwood *v.* Munnings was mentioned by Park, J., and he, like Judge Story, understood it, not as imposing the duty to inquire into the state of the principal's affairs, but only as to the character of the drawers. Indeed, there is hardly any rule better settled, or of more universal application, than that the appointee need not inquire as to matters in their own nature private and confidential between the agent and principal. It may be doubted, says Mr. Justice Story, if upon this subject there is any solid distinction between a special authority to do a particular act, and a gen-

[1] Per Lord Loughborough in De Bouchout *v.* Goldsmid, 5 Ves. 213. See also Schimmelpennich *v.* Bayard, 1 Peters, 264.

§ 73. We are, however, in all such cases, carefully to distinguish between the authority given to the agent, and the private instructions given to him, as to his mode of executing that authority.[1] For,

eral authority to do all acts in a particular business. Each includes the usual and appropriate means to accomplish the end. (Story on Agency, 70.) Is it among those means that the appointee shall lose his money, because the attorney happens to betray the interests of his principal? Would not such a rule rather be a means to make the power utterly unavailable? No prudent man would advance his money under such are sponsibility. The rule supposes a degree of capacity to look into the affairs and even the private intentions of others, which no human being possesses." Mr. Chief Justice Nelson dissented, and gave the substance of his views as follows: "It is insisted, the bank was not bound to inquire further than to ascertain that the attorney was empowered to make and indorse notes for his principal. But the same instrument which conferred this power also contained the special limitation, and it was therefore as material for them to bring the case within that, as within any other part of the authority. The one qualified the other, and both must be regarded in ascertaining the sum of the whole. Mr. Lloyd, in his valuable edition of Paley on Agency (p. 192, 3d ed.), observes, that all written powers, such as letters of attorney, or letters of instruction, receive a strict interpretation; the authority never being extended beyond that, which is given in terms, or is absolutely necessary for carrying the authority so given into effect. He refers to Atwood *v.* Munnings, 7 B. & Cressw. 278, which, in principle, is decisive in favor of the judgment of the court below. There, the power was given to the wife of the defendant, 'for him and on his behalf to pay and accept such bill or bills of exchange as should be drawn or charged on him by his agents, &c., and generally to do, negotiate, and transact the affairs and business of him (Munnings) during his absence,' &c. She accepted four bills drawn by one of the partners of Munnings, the proceeds of which were applied in payment of partnership debts. Another bill was afterwards drawn in order to raise money to take up the former ones, which was accepted by Munnings's wife and discounted by the plaintiffs. The question was, whether the wife had authority to bind her husband by the acceptance. The Court of K. B. held that she had not; that as the bill was accepted by procuration, the party taking it should, in the exercise of a reasonable prudence and caution, have required the production of the power, when he would have seen, that it only gave authority to accept bills for the defendant and on his behalf; that no such power was requisite as to the partnership transactions, for the other partners might have bound him by their acceptance; and that the words must be confined to their obvious meaning; namely, an authority to accept in those cases where it was right for him to accept in his individual capacity." [Equit. Life Ass. Co. *v.* Poe, 53 Md. 28; Smith *v.* McGuire, 3 H. & N. 554; Nixon *v.* Palmer, 4 Seld. 400; Stainback *v.* Bank of Virginia, 11 Grattan, 269; Beach *v.* Vanderwater, 1 Sandford, Sup. Ct. (N. Y.) 265.]

[1] [See Johnson *v.* Jones, 4 Barb. 369; Bryant *v.* Moore, 26 Me. 84: so in Earp *v.* Richardson, 81 N. C. 5, where one buying a note past due from an agent acting under limited power was held to be put on inquiry as to the extent of the agent's power; so with parties dealing with agents of corporations. Silliman *v.* Fredericksburg R. Co., 27 Gratt. 119; Rafferty *v.* Haldron, 81½ Pa. St. 438. — ED.]

although where a written authority is known to exist, or is, by the very nature of the transaction, presupposed, it is the duty of persons dealing with the agent, to make inquiries as to the nature and extent of such authority, and to examine it; yet no such duty exists to make inquiries, as to any private letter of instructions from the principal to the agent; for such instructions may well be presumed to be of a secret and confidential nature, and not intended to be divulged to third persons.[1] In like manner, if the written authority apparently justifies the act, it is no objection that the agent has secretly applied his authority to other purposes than those for which it was given; as if, having an authority to make notes in the principal's name in managing his business, the agent should make such notes for secret purposes of a different nature, which could not be known to other persons dealing with him.[2] Indeed, it may well be doubted, whether in these respects, there is any solid distinction between the case of a special authority to do a particular act, and a general authority to do all acts in a particular business.[3] Each includes the usual and appropriate means to accomplish the end. In each case the agent is apparently clothed with full authority to use all such usual and appropriate means, unless upon the face of the instrument a more restrictive authority is given, or must be inferred to exist. In each case, therefore, as to third persons innocently dealing with his agent, the principal ought equally to be bound by the acts of the agent, executing such authority by any of those means, although he may have given to the agent separate,

[1] Withington *v.* Herring, 5 Bing. 442; Allen *v.* Ogden, 1 Wash. Cir. 174; Munn *v.* Commission Co. 15 John. 44; Gibson *v.* Colt, 7 John. 393; Andrews *v.* Kneeland, 6 Cowen, 354; North River Bank *v.* Aymar, 3 Hill, 262, 273; Ante, § 72, note; Post, §§ 97, 98, 105, 127, note, 128, note, 129–133. But see Peters *v.* Ballestier, 3 Pick. 495, and especially what is said by Mr. Justice Putnam, in pp. 502, 503; Longworth *v.* Conwell, 2 Blackf. (Ind.) 469; Tomlinson *v.* Collett, 3 Blackf. (Ind.) 436; Walker *v.* Skipwith, Meigs (Tenn.), 502; [Stewart *v.* Woodward, 50 Vt. 78].

[2] Ibid.; Ante, § 69; North River Bank *v.* Aymar, 3 Hill, 262, 270, 271; Ante, § 72, note. [Thus, where a miner had carried out a sale, made on credit by a commission merchant, held that he would be bound to a third party by a contract for the sale of coal on credit, made for future delivery by such agent, notwithstanding he had privately forbidden the agent to sell on credit or for future delivery. White *v.* Fuller, 67 Barbour, 267. So where the instructions to an agent are to employ men by written agreements, and he employs them orally, the principal will be bound if the persons so employed were ignorant of the agent's instructions. Rourke *v.* Story, 4 E. D. Smith, 54. — Ed.]

[3] Post, § 133, and note; [First Nat. Bank of Trenton *v.* Gay, 63 Mo. 33].

private, and secret instructions of a more limited nature, or the agent may be secretly acting in violation of his duty.[1]

[1] Helyear *v.* Hawke, 5 Esp. 73; Runquist *v.* Ditchell, 3 Esp. 64; Hicks *v.* Hankin, 4 Esp. 114; Fenn *v.* Harrison, 3 T. R. 757; s. c. 4 T. R. 177; Alexander *v.* Gibson, 2 Camp. 555; Whitehead *v.* Tuckett, 15 East, 400. See also Pickering *v.* Busk, 15 East, 38, 43; Stainer *v.* Tysen, 3 Hill, 279; Munn *v.* Commission Co. 15 John. 44; Perkins *v.* Washington Ins. Co. 4 Cowen, 659; Andrews *v.* Kneeland, 6 Cowen, 354; Beals *v.* Allen, 18 John. 363; North River Bank *v.* Aymar, 3 Hill, 262; Rossiter *v.* Rossiter, 8 Wend. 498, 499; Ante, § 72, note; 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 412; Id. pp. 478–480 (5th ed.). The case, intended to be put in the text, is that of an authority distinct, and not derived, from the instructions, for if the original authority is restricted and qualified, the restrictions and qualifications constitute a part of the power itself, and govern its extent. Thus, if the owner of a horse should give a written authority to another person, in general terms, to sell the horse; and this paper should be communicated to the buyer, as proof of the authority to sell; and the seller should have given separate, private, written or verbal directions, to the agent not to sell, except at a particular price, and the buyer should ignorantly buy at a less price, the question would then arise, whether the sale was valid. In such a case, the authority to sell would be unlimited upon the paper, and yet it would be limited by the instructions. In such a case, who ought to suffer, the buyer or the seller, by the wrongful act of the agent? In the case of a general agent, it is agreed, on all sides, that private instructions will not vary the right of the agent to bind the principal in dealings with third persons, ignorant of those instructions. In what respect does a general authority to do an act differ from a general authority to do all acts relative to a particular business or employment, in regard to this point? 2 Kent, Comm. Lect. 41, pp. 620, 621, 622 (4th ed.) Lord Ellenborough, in Pickering *v.* Busk, 15 East, 38, 43, said: "It cannot fairly be questioned in this case but that Swallow had an implied authority to sell. Strangers can only look to the acts of the parties, and to the external indicia of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine, that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority, with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place, where it is the ordinary business of the person, to whom it is confided, to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository for sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one sends goods to an auction room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe." Post, § 94. See what is said by Lord Kenyon, in Fenn *v.* Harrison, 3 T. R. 760; and by Bayley, J., in Pickering *v.* Busk, 15 East, 45, 46; Schimmelpennich *v.*

§ 74. There is another consideration, highly important to be borne in mind in the interpretation of written instruments, and especially of those of a commercial nature, such as letters of instruction, or orders; and that is, that, if the instrument is not expressed in plain and unequivocal terms, free from ambiguity; but the language is fairly susceptible of different interpretations, and the agent, in fact, is misled, and adopts and follows one, when the principal intended the other, — there, the principal will be bound, and the agent will be exonerated. For, in such a case, the agent has acted in good faith, and within the supposed limits of his authority; and if one of two innocent parties must suffer, he ought to suffer in preference who has misled the confidence of the other into any unwary act.[1] In cases of doubt, the general rule is, that the words are to be construed most strongly against the writer: "verba fortius accipiuntur contra proferentem." [2] There is no doubt (for example) that in letters of instructions of a commercial nature, a wish, expressed by the consignor of goods to his agent or factor, may, under particular circumstances, amount to a positive command;[3] especially where the agent or factor has not any interest, and has not made any advances or incurred any liabilities touching the same; for in the latter cases different considerations may arise. But ordinarily the mere expression of wishes will not amount to positive command, unless such is the fair and reasonable interpretation of the language in the connection in which it stands to the context.[4]

Bayard, 1 Peters, 264. See also Whitehead *v.* Tuckett, 15 East, 400; Post, §§ 126, 127, 130, 131, 133; [Smith *v.* McGuire, 3 H. & N. 553; Smith *v.* East India Co., 16 Simons, 76].

[1] See Loraine *v.* Cartwright, 3 Wash. Cir. 151; Dodge *v.* D'Wolf, MSS. Cir. Ct. in Mass. 1833; Coucier *v.* Ritter, 4 Wash. Cir. 551; De Tastet *v.* Crousillat, 2 Wash. Cir. 132; Post, §§ 82, 199; [Mattocks *v.* Young, 66 Me. 459].

[2] Ib.; Blackett *v.* Royal Exc. Ins. Co. 2 Cromp. & Jerv. 244; Branch's Maxims, 232. See Burrell *v.* Jones, 3 B. & Ald. 47.

[3] Brown *v.* M'Gran, 14 Peters, 480; [Marfield *v.* Douglas, 1 Sandford, Sup. Ct. 360; Wilson *v.* Wilson, 26 Penn. St. 393].

[4] Ibid. This subject was much considered in Brown *v.* M'Gran, 14 Peters, 480, where the court said: "Here again the point is open, whether the language (of a letter) imports, that the defendants construed the wishes of the plaintiff to be simply a strong expression of desire or opinion, or a positive order; and also, whether the words 'noted accordingly' import that the defendants took notice thereof, or took notice of and assented to obey, the wishes or order of the plaintiff. The language is susceptible of either interpretation, according to circumstances. If the case had been one of simple consignment, without any interest in the consignee, or any advance or liability incurred on account thereof, the wishes might fairly be presumed to be orders; and the

§ 75. In other respects, commercial instruments, such as orders and letters of instruction, are generally construed with great liberal-

noting the wishes, accordingly, an assent to follow them. But very different considerations might apply where the consignment should be, as the present is, one clothed with a special interest and a special property, founded upon advances and liabilities. We think, therefore, that this objection is not, under the circumstances of the case, maintainable. It would be quite another question, whether the court might not, in its discretion, have assumed upon itself the right and duty of construing these letters. There is no novelty in this doctrine. It will be found recognized in Ekins *v.* Macklish, Ambler, 184, 185; Lucas *v.* Groning, 7 Taunt. 164, and Rees *v.* Warwick, 2 B. & Ald. 113, 115. But the main objection to the instruction is of a more broad and comprehensive character. The instruction in effect decides, that, in the case of a general consignment of goods to a factor for sale, in the exercise of his own discretion, as to the time and manner of sale, the consignor has a right, by subsequent orders, to suspend or postpone the sale at his pleasure; notwithstanding the factor has, in consideration of such general consignment, already made advances, or incurred liabilities for the consignor, at his request, trusting to the fund for his due reimbursement. We are of opinion, that this doctrine is not maintainable in point of law. We understand the true doctrine on this subject to be this: Wherever a consignment is made to a factor for sale, the consignor has a right generally to control the sale thereof, according to his own pleasure, from time to time, if no advances have been made or liabilities incurred on account thereof; and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. If, however, the factor makes advances, or incurs liabilities on account of the consignment, by which he acquires a special property therein; then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances or meet such liabilities; unless there is some existing agreement between himself and the consignor, which controls or varies this right. Thus, for example, if, contemporaneous with the consignment and advances or liabilities, there are orders given by the consignor, which are assented to by the factor, that the goods shall not be sold until a fixed time, in such a case, the consignment is presumed to be received by the factor subject to such orders; and he is not at liberty to sell the goods to reimburse his advances or liabilities, until after that time has elapsed. The same rule will apply to orders not to sell below a fixed price; unless, indeed, the consignor shall, after due notice and request, refuse to provide any other means to reimburse the factor. And in no case will the factor be at liberty to sell the consignment contrary to the orders of the consignor, although he has made advances, or incurred liabilities thereon; if the consignor stands ready, and offers to reimburse and discharge such advances and liabilities. On the other hand, where the consignment is made generally without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, there the legal presumption is, that the factor is intended to be clothed with the ordinary rights of factors to sell in the exercise of a sound discretion, at such time and in such mode as the usage of trade and his general duty require; and to reimburse himself for his advances and liabilities, out of the proceeds of the sale; and the consignor has no right, by any subsequent orders, given after advances have been made or liabilities incurred by the factor, to

ity, and free from technical rules, for the satisfactory reason, that they are generally drawn in a loose and inartificial manner, and are designed to subserve the common purposes of life and business, and leave much to be gathered from the usages of trade, and the practice of particular employments.[1] Still, however, where, upon the whole, the true sense in which the language is used is plain, neither party will be allowed to escape from this sense by showing that another possible interpretation, of a different character, may be given to it, either more broad or more restricted. Thus, for example, where an agent was ordered to sell stock, "should they (the funds) be at eighty-five per cent, or above that price," it was held, that the agent was bound to sell, when the funds reached eighty-five per cent; and that he had not a general authority to act for his employer, so that he might defer selling till the funds should reach a higher price than eighty-five per cent. He not having sold the stock, when it had arrived at that price, was accordingly held accountable for that price.[2] What is the true interpretation of mercantile phrases in such instructions or orders, is not always a question of law, but may, in many cases, be properly left to a jury to decide, where the phrases admit of different meanings. Thus, for example, it has

suspend or control this right of sale, except so far as respects the surplus of the consignment, not necessary for the reimbursement of such advances or liabilities. Of course, this right of the factor to sell to reimburse himself for his advances and liabilities, applies with stronger force to cases where the consignor is insolvent, and where, therefore, the consignment constitutes the only fund for indemnity." Parker *v.* Brancker, 22 Pick. 40. [The case of Brown *v.* M'Gran, and the rights of factors, were much considered by the Superior Court of the city of New York in Marfield *v.* Douglas, 1 Sandford, Sup. Ct. 360, in which case, the principal wrote to his factor, giving his views of the probable supply of the article consigned, and stating facts which indicated a short supply, and in conclusion said, "I have thought it best for you to take my pork out of the market for the present, as thirty days will make an important change in the value of the article;" and it was held that the letter constituted instructions to withhold the property from sale until the receipt of further directions. See also Blot *v.* Boiceau, 1 Sandford, Sup. Ct. 111; 3 Comst. 78; Frothingham *v.* Everton, 12 N. H. 239. But a recent English case, after considering Brown *v.* M'Gran, decides that the factor has no right to sell the goods contrary to the order of his principal, though the latter has neglected, on request, to repay the advances; Smart *v.* Sandars, 5 Manning, Granger, & Scott, 895. See Whitney *v.* Wyman, 24 Md. 131, adopting the law of Brown *v.* M'Gran; Field *v.* Farrington, 10 Wall. 141; and see Mr. Holmes's note "*Right to sell — Factors*," 2 Kent, Comm. (12th ed.) 642. — R.]

[1] Post, § 82 ; [Grant *v.* Ludlow, 8 Ohio St. 54].

[2] Bertram *v.* Godfray, 1 Knapp, 381; [Cameron *v.* Durkheim, 55 N. Y. 425; Corbett *v.* Underwood, 83 Ill. 424].

been left to the jury to say, whether the words in a letter, referring to a bill of exchange enclosed "when duly honored," meant, in connection with the other language, duly accepted, or duly paid.[1]

§ 76. We have already seen, that, where the agency is created and conferred by a written instrument, the nature and extent of the authority must be ascertained from the instrument itself, and cannot be enlarged by parol evidence of the usage of other agents in like cases, or of an intention to confer additional powers; for that would be to contradict or to vary the terms of the written instrument.[2] In connection with this doctrine, it is often stated, that an implied authority cannot, in general, take place, where there is an express authority in writing; for the maxim is, Expressum facit cessare tacitum. But we must take care that the doctrine, in each of these instances, is understood with the qualifications and limitations properly belonging to it; for, otherwise, one may be greatly misled in its just application, as we shall immediately see.

§ 77. In the first place, the usages of a particular trade or business, or of a particular class of agents, are properly admissible, not, indeed, for the purpose of enlarging the powers of the agents employed therein, but for the purpose of interpreting those powers which are actually given; for the means ordinarily used to execute the authority are included in the power, and may be resorted to by all agents, and especially by commercial agents.[3] An agent to sell (as we have seen) may, if the usages of trade or if the particular business authorize it, sell on credit, not exceeding the usual credit.[4] But, without such usage, an authority to sell would be construed to be limited to a sale for money. Upon the same ground, an authority to buy goods will, or will not, authorize a purchase on the credit of the principal, and the giving of a negotiable security for the purchase-money, according as there exists, or does not exist, a usage to justify it.[5]

[1] Lucas *v.* Groning, 7 Taunt. 164; Mackbeath *v.* Haldimand, 1 T. R. 172; Ante, § 63, note, § 74, note; Morrell *v.* Frith, 3 Mees. & Wels. 402; [Simonds *v.* Clapp, 16 N. H. 222; Olyphant *v.* McNair, 41 Barb. 446].

[2] Ante, § 62; Hogg *v.* Snaith, 1 Taunt. 347, 352; Murray *v.* East India Co., 5 B. & Ald. 204, 210, 211; [Lyman *v.* Hayden, 118 Mass. 422].

[3] Ante, §§ 60, 73; Post, §§ 96, 180; [Lamert *v.* Heath, 15 M. & W. 486; Kraft *v.* Fancher, 44 Md. 204; Howard *v.* Smith, 56 Mo. 314].

[4] Ante, § 59; 2 Kent, Comm. Lect. 41, pp. 622, 623 (4th ed.); Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326; 1 Bell, Comm. pp. 386–388, art. 410, 411; Id. pp. 477, 478, 482 (5th ed.); [May *v.* Mitchell, 5 Humph. 365].

[5] [Thus, where an agent for the sale of land was instructed to sell for one-

§ 78. We may further illustrate these principles by a few cases. An authority to an agent to sell goods, does not authorize him to exchange them in barter,[1] or to pledge them; for there is no usage of trade to that extent.[2] An authority to sell stock does not authorize a sale on credit, as sales of stock are always for ready

third cash, a contract made by him to sell without strict compliance with that condition could not be enforced against his principal; and proof that the custom of the country did not require a purchaser to pay cash will not sustain a contract. Wanless *v.* McCandless, 38 Iowa, 20. Nor does an authority to purchase for cash give an agent any authority to buy on credit. Stoddard *v.* McIlwain, 7 Rich. 525. Nor can a special agent, authorized to deliver a bill of lading only upon payment of the bill of exchange drawn against the goods and attached to the bill of lading, bind his principal by a delivery made without such payment. Stollenwerck *v.* Thacher, 115 Mass. 224. Nor does an authority to an agent to sell goods give him power to rescind the sale and adjust a claim for breach of a warranty. Bradford *v.* Bush, 10 Ala. 386. Nor does an authority to advance money for a corporation authorize an agent to give a negotiable promissory note for the advance. Webber *v.* Williams College, 23 Pick. 302. And an authority to sell at retail does not authorize a clerk to sell by wholesale, to satisfy a debt due to the purchasers from the principal. Hampton *v.* Matthews, 2 Harris, 105; Lee *v.* Tinges, 7 Md. 235. An agent to make purchases has no authority to bind his principal by a negotiable note or bill of exchange for such purchases, Taber *v.* Cannon, 8 Metc. 456; Torrey *v.* Dustin Mon. Ass., 5 Allen, 327; Emerson *v.* Providence Hat Man. Co., 12 Mass. 237; Savage *v.* Rix, 9 N. H. 263; Paige *v.* Stone, 10 Metc. 160; Denison *v.* Tyson, 17 Vt. 549; Hazeltine *v.* Miller, 44 Me. 177; Gould *v.* Norfolk Lead Co., 9 Cush. 338: unless the giving of such notes be indispensable to carry on the business in which he is employed, Temple *v.* Pomroy, 4 Gray, 128. And one who is simply employed to sell goods and pay over the proceeds, has no authority to exchange the money he receives with a third person; and if he receives a counterfeit bill, it is not the loss of his principal. Kent *v.* Bornstein, 12 Allen, 342. Nor can a committee, authorized by vote of the proprietors of a meeting-house to sell on a certain day, sell the same on any other day. Bliss *v.* Clark, 16 Gray, 60. So where a broker was ordered to buy fifty bales of cotton for his principal, and bought two hundred and fifty bales from one vendor, *held*, that money given him to purchase the fifty bales could be recovered by his principal on the ground of total failure of consideration. Bostock *v.* Jardine, 3 H. & C. 700. — Ed.]

[1] Guerreiro *v.* Peile, 3 B. & Ald. 616.

[2] Paterson *v.* Tash, 2 Str. 1178; Newsome *v.* Thornton, 6 East, 17; Urquhart *v.* McIver, 4 John. 103; Laussatt *v.* Lippincott, 6 Serg. & R. 386; Shipley *v.* Kymer, 1 M. & Selw. 484. The doctrine, as to the want of authority of a factor to pledge the goods of his principal, is now well settled, although it has been greatly doubted at different times. See Paterson *v.* Tash, 2 Str. 1178; Daubigny *v.* Duval, 5 T. R. 604; Pickering *v.* Busk, 15 East, 38, 44; Martini *v.* Coles, 1 M. & Selw. 140, 146; Duclos *v.* Ryland, cited 5 Moore, 518, n.; De Bouchout *v.* Goldsmid, 5 Ves. 211; Kinder *v.* Shaw, 2 Mass. 398. It is, perhaps, somewhat difficult, upon principle, to sustain it, as the factor is always enabled to hold himself out to the world as owner. See also Story on Bailm. §§ 325, 326, 455. But of this more will be said hereafter. Post, § 92.

money.[1] An authority to sell and transfer stock for the principal does not authorize the agent to transfer it by way of security for his own private debt; for it is not an ordinary exercise of such an authority.[2] An authority to adjust and collect an unliquidated demand does not authorize the agent to pledge the money when received, or a note taken for the amount.[3]

§ 79. In the next place, although, in general, the maxim is true, that where an express power is conferred by writing, it cannot be enlarged by parol evidence; yet the maxim is applicable only to cases where the whole authority grows solely out of the writing; and the parol evidence applies to the same subject-matter at the same point of time, and therefore, in effect, seeks to contradict, or vary, or control, the effect of the writing. When the parol evidence seeks to establish a subsequent enlargement of the original authority, or to give an authority for another object, or where the express power is engrafted on an existing agency, affecting it only *sub modo*, to a limited extent, the maxim loses its force and application.[4]

§ 80. Thus, for example, if an agent should be authorized in writing to purchase certain goods at a fixed price; there could be no question, that evidence of a subsequent verbal authority to purchase other goods at a different price, or the same goods at a different price, would be admissible to establish the right of the agent; for in no just sense would it contradict, or vary, or control the legal construction or effect of the original authority of the agent. It would be superinduced upon it, as a distinct and new authority. So, where an agency is of a general nature, and particular written instructions are given, applicable to certain things belonging to that agency, such instructions are understood in no manner to control the general agency, except in those very particulars. Thus, the master of a ship retains, by implication, all the general authority belonging to his station, notwithstanding any written instructions for the voyage; for these control his implied authority only *pro tanto*, to the extent which they are intended to reach.

§ 81. In the next place, although there is a written authority,

[1] Wiltshire *v.* Sims, 1 Camp. 258; State of Illinois *v.* Delafield, 8 Paige, 527, 540.

[2] De Bouchout *v.* Goldsmid, 5 Ves. 211. See Parsons *v.* Webb, 8 Greenl. 38; Post, § 92.

[3] Jones *v.* Farley, 6 Greenl. 226; Hays *v.* Linn, 7 Watts, 520; Post, § 99.

[4] [See Williams *v.* Cochran, 7 Richardson, 45; Hartford Fire Ins. Co. *v.* Wilcox, 57 Ill. 180; Allis *v.* Goldsmith, 22 Minn. 123.]

under which an agent is transacting business for and on the credit of his principal, and therefore persons dealing with him, and knowing that he is acting under such written authority, are bound to know the extent of his authority, and to inquire into its limitations; yet if the principal, by his declarations or conduct to such persons, has authorized the opinion, that he had in fact given more extensive powers to his agent than were conferred, the principal will be bound by the acts of such agent, in his negotiations with such persons, to the extent of the authority which such declarations and conduct have fairly led them to believe to exist.[1] So, if an agent is appointed, and receives written orders limiting his authority, but, at the same time, he is referred by those orders to the verbal communications of another general agent of the principal, who declares, that he has authority to control and vary these written orders, and the agent acts in obedience to new orders given by the general agent, he will be fully justified in his deviation from the original orders.[2] And parol evidence would certainly be admissible, for the purpose of establishing such declarations and new orders of the general agent.[3]

§ 82. In the next place, it may be laid down as a general rule, that where an express authority is conferred by informal instruments, such as letters of advice, or instructions, or loosely drawn orders, especially where they are general in their terms, or confer a general authority, they are construed with more liberality than more formal and deliberate instruments.[4] This rule is adopted for the convenience of merchants; and, indeed, seems indispensable to general confidence and security, in the ordinary operations of commerce and navigation and trade.[5] The Roman law inculcated an equally comprehensive doctrine. "Ideo per nuncium, quoque vel per epistolam, mandatum suscipi potest. Si quis alicui scripserit, ut debitorem suum liberet, seque eam pecuniam, quam is debuerit, soluturum mandati actione tenetur. Item, sive rogo, sive volo, sive mando, sive alio quocunque verbo scripserit, mandati actio est."[6]

[1] Schimmelpennich *v.* Bayard, 1 Peters, 264.

[2] Mannella *v.* Barry, 3 Cranch, 415; Ante, §§ 68, 72, 73.

[3] Ibid.

[4] Ante, §§ 74, 75, 180.

[5] 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 4, art. 409, 410, p. 386 (4th ed.); Ante, §§ 74, 75; [Bosseau *v.* O'Brien, 4 Biss. 395].

[6] Pothier, Pand. Lib. 17, tit. 1, n. 19; Dig. Lib. 17, tit. 1, l. 1, §§ 1, 2, 27, Introd.

§ 83. Subject to these reasonable qualifications and restrictions, the doctrine is unquestionably true, that an express written authority cannot be enlarged by parol evidence, or an authority be implied, where there exists an express one. The authority, too, is construed, as to its nature and extent, according to the force of the terms used, and the objects to be accomplished. If the authority is special, it is construed to include only the usual means appropriate to the end. If the authority is general, it is still construed to be limited to the usual means to accomplish the end. Even if a general discretion is vested in the agent, it is not deemed to be unlimited. But it must be exercised in a reasonable manner, and cannot be resorted to in order to justify acts which the principal could not be presumed to intend;[1] or which would defeat, and not promote, the apparent end or purpose for which the power was given.

§ 84. Hitherto we have principally referred to cases of agency created by written instruments. But by far the most numerous cases of agency arise, not from formal or informal written instruments, but from verbal authorizations, or from implications, from the particular business or employment of the principal or agent, or from the usual dealings between them, or from the general usages of trade and commerce.[2]

[1] 2 Kent, Comm. Lect. 41, pp. 617, 618 (4th ed.); Id. 620, 621; 1 Domat, B. 1, tit. 15, § 3, art. 3, 10, 11; Mackbeath *v.* Haldimand, 1 T. R. 172, 182; [Charles *v.* Jacobs, 6 Rich. S. C. 69].

[2] 2 Kent, Comm. Lect. 41, 613–615 (4th ed.); 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 4, art. 410 (4th ed.). Mr. Bell, in his Commentaries on Commercial Law, has introduced some very appropriate remarks. "The power of a factor, or agent, or broker" (says he), "is conferred, either, *first*, in writing; formally, by power of attorney, or more loosely, in correspondence; or, *secondly*, by parol agreement; or, *thirdly*, by mere employment. If the powers are special, they form the limits of the authority; if general, they will be more liberally construed, according to the necessities of the occasion, and the material, or ordinary, or reasonable course of the transaction.

"(1.) In the management of the affairs of a foreign merchant, especially where there is occasion to discharge debts and receive money, or to carry on judicial proceedings, a power of attorney is the proper evidence of authority. It empowers the factor to represent the principal, and act as he might have done if present.

"(2.) But agents, or factors, or brokers, are generally appointed in mercantile affairs by letter. So, a confidential clerk is authorized to accept or indorse bills by a letter addressed to him, expressed in the simplest terms, and without either technical words or the solemnities of a formal deed. So, in the course of correspondence, goods are consigned from abroad, with directions to the consignee to sell them, and either to apply the proceeds in a particular way, or to place them to account; or, merchants or manufacturers, with an

§ 85. In all such cases, whether the agency be of a special nature, or of a general nature, it may also be laid down as a universal principle, that it includes, unless the inference is expressly excluded by other circumstances, all the usual modes and means of accomplishing the objects and ends of the agency.[1] And even a deviation by the agent from the appropriate course, will not vitiate his act, if it be immaterial or circumstantial only, and does not, in substance, exceed his right and duty.[2] Indeed, a literal adherence to the common course of business may sometimes, under peculiar circumstances, defeat the very objects of the agency; and new and unexpected emergencies and necessities of such a critical nature may arise, as, if one may use the expression, will expand the authority beyond its ordinary limits, and justify even a deviation from its ordinary limitations and import.[3]

accumulation of goods on hand, place them with another (*ex. gr.* a general agent or another merchant), who agrees to manage the sales, and to advance a certain proportion to be reimbursed out of the sales; or one is desired to buy goods for another, and either intrusted with credit or money for that purpose, or left to make the purchases as he can, on his own or the principal's general credit; or goods are sent to the warehouse of a general agent, with particular directions as to their disposal, or to be sold at the ordinary rate of the market.

"(3.) In the course of mercantile dealings, goods are placed with general agents, or sent to public warehouses, and the power of disposal intrusted to brokers; and so an agency to this effect is constituted without writing of any kind. Many great merchants, in London and elsewhere, have neither goods nor warehouses in their possession; but, intrusting all their goods to brokers and agents, confine their own attention to the great lines of commercial intercourse.

"(4.) Mercantile agents have authority frequently conferred on them by mere implication. This generally is grounded on the sanction given by the employer to credit raised by a person acting in his name. Such is the power implied from giving sanction to the acts of a procurator; as where a clerk accepts or indorses bills for his master, which that master pays as legitimately accepted, or allows to be as well transferred, as if indorsed by himself." [Belew *v.* Jones, 56 Miss. 592.]

[1] Ante, §§ 57, 59, 60, 73, 74, 76, 77; 1 Domat, B. 1, tit. 15, § 3, art. 3; Id. tit. 16, § 3, art. 1; Dawson *v.* Lawley, 4 Esp. 65, 66; [Lovejoy *v.* Middlesex R. R. Co., 128 Mass. 480].

[2] Com. Dig. *Attorney*, C. 15; Parkhill *v.* Imlay, 15 Wend. 431; Post, §§ 118, 141, 201.

[3] 2 Kent, Comm. Lect. 41, p. 614 (4th ed.); Judson *v.* Sturges, 5 Day, 556. 560; 3 Chitty on Com. & Manuf. 218; Post, §§ 118, 141, 193, 237; Liotard *v.* Graves, 3 Caines, 226; Lawler *v.* Keaquick, 1 John. Cas. 174; Drummond *v.* Wood, 2 Caines, 310; Forrestier *v.* Boardman, 1 Story, 43; [Harter *v.* Blanchard, 64 Barb. (N. Y.) 617].

§ 86. Whenever the authority given to an agent is to transact business for the principal in a foreign country, or in another state, it must, in the absence of all counter proofs, be presumed to include the authority to transact it in the forms, and by the instruments, and according to the laws of the place where it is to be done.[1] And each party, under such circumstances, is bound to know what such forms and instruments are, and what acts are required by those laws. For it would be unreasonable to presume, that the principal authorized the end, and refused the lawful means; or that he intended to violate the laws, or to mislead his agent in relation to his powers.[2]

§ 87. In cases of agency, arising by implication and presumption from any of the circumstances already alluded to, the nature and extent of the authority conferred upon the agent are to be ascertained and limited in the same manner, and by the same considerations, which govern in the exposition of an express authority conferred in general terms. If the agency arises by implication from numerous acts done by the agent, with the tacit consent or acquiescence of the principal, it is deemed to be limited to acts of the like nature.[3] If it arises from the general habits of dealing between the particular parties, it is deemed to be limited to dealings of the same kind, and governed by the same habits. If it arises from the employment of the agent in a particular business, it is, in like manner, deemed to be limited to that particular business.[4] And the authority must be implied from facts which have occurred in the course of such employment, and not from mere argument as to the utility and propriety of the agent's possessing it.[5] If it arises from an authority to do a single or particular act, the agency is limited to the appropriate means to accomplish that very act and the required end, and the implied agency stops there.[6] In short, an implied agency is never construed to extend beyond the obvious purposes for which it

[1] Owings *v.* Hull, 9 Peters, 607; Story on Conflict of Laws, §§ 260, 262, 286, 318.

[2] Owings *v.* Hull, 9 Peters, 607; [Rosewarne *v.* Billings, 15 C. B. N. S. 316].

[3] 1 Domat, B. 1, tit. 16, § 3, art. 1; 2 Kent, Comm. Lect. 41, pp. 622, 623 (4th ed.).

[4] 1 Domat, B. 1, tit. 16, § 3, art. 1, 2; Odiorne *v.* Maxcy, 13 Mass. 178; Salem Bank *v.* Gloucester Bank, 17 Mass. 1; [Williams *v.* Getty, 31 Penn. St. 464].

[5] Hawtayne *v.* Bourne, 7 Mees. & Wels. 595.

[6] Ante, §§ 55, 56, 71, 77, 78, 83, 85; 3 Chitty on Com. & Manuf. 196; Smith on Mer. Law, p. 110 (3d ed.), 1843.

is apparently created.[1] The intention of the parties, deduced from the nature and circumstances of the particular case, constitutes the true ground of every exposition of the extent of the authority; and when that intention cannot be clearly discerned, the agency ceases to be recognized, or implied. "Obligatio mandati consensu contrahentium consistit."[2] And hence the proper corollary of the Roman law; "Diligenter fines mandati custodiendi sunt; nam qui excessit, aliud quid facere videtur."[3]

§ 88. Indeed the Roman law fully recognized the same doctrine, as to the nature and extent of limitations of an implied agency. Thus, in the case of a common shopman, or other person clothed with the institorial power,[4] the party could not bind his principal, except within the limits of that power. "Non tamen omne, quod cum institore geritur, obligat eum, qui præposuit; sed ita, si ejus rei gratia, cui præpositus fuerit, contractum est, id est, duntaxat ad id, ad quod eum præposuit.[5] Proinde, si præposui ad mercium distractionem, tenebor nomine ejus ex empto actione. Item, si fortè ad emendum eum præposuero, tenebor duntaxat ex vendito. Sed neque, si ad emendum, et ille vendiderit, neque, si ad vendendum, et ille emerit, debebit teneri."[6] So, that we here see it laid down in positive terms, that an agent employed to buy, has no implied authority to sell; and an agent employed to sell, has no implied authority to buy.

§ 89. A few examples, besides those which have been already

[1] [Where a merchant's clerk makes sales, and the merchant approves or in any way holds out to the community that the clerk is his agent, he is bound by the sales made by him afterwards in the regular course of trade. But when a clerk was allowed to make one sale, and then fifteen months afterwards made another at an improper price, the principal was not bound thereby. Cupples *v.* Whelan, 61 Mo. 583. But it has been held that a single act of an assumed agent and a single recognition of his authority may be enough to prove his agency to do other similar acts. Wilcox *v.* Chicago, Milwaukee, &c. R. R. Co., 24 Minn. 269. See Dickinson Co. *v.* Miss. Valley Ins. Co., 41 Ia. 286; Johnson *v.* Wingate, 29 Maine, 404; Brooks *v.* Jameson, 55 Mo. 505; Jones *v.* Warner, 11 Conn. 41; Wright *v.* Hood, 49 Wisc. 235; Womack *v.* Bird, 63 Ala. 500; Columbia Bridge Co. *v.* Geisse, 38 N. J. L. 39. Contra, Reed *v.* Baggott, 5 Ill. App. 257. — Ed.]

[2] Dig. Lib. 17, tit. 1, l. 1; 1 Domat, B. 1, tit. 15, § 1, art. 5; Id. B. 1, tit. 16, § 3, art. 1, 2; Ante, § 47.

[3] Dig. Lib. 17, tit. 1, l. 5; Ante, §§ 43, 70; Kerns *v.* Piper, 4 Watts, 222.

[4] See Ante, § 8; Dig. Lib. 14, tit. 3, l. 3, 18.

[5] Dig. Lib. 14, tit. 3, l. 5, § 11.

[6] Dig. Lib. 14, tit. 3, l. 5, § 12; Ante, §§ 43, 70, 87; 1 Domat, B. 1, tit. 16, § 3, art. 2.

incidentally introduced, may serve further to illustrate these principles and deductions. And, first, of an authority resulting from the tacit consent or acquiescence of the principal. Where a man stands by knowingly, and suffers another person to do acts in his own name, without any opposition or objection, he is presumed to have given an authority to do those acts.[1] "Semper, qui non prohibet pro se intervenire, mandare creditur.[2] Si passus sim, aliquem pro me fidejubere, vel aliàs intervenire, mandati teneor."[3] Thus, if a shopman is allowed, with the knowledge and acquiescence of his master, to sell goods which are on sale in the shop, the master is presumed to have given him the requisite authority for that purpose. But such an exercise of the authority to sell will not, *per se*, justify the shopman in buying goods for his master; for (as we have seen) an authority to buy cannot properly be inferred from an authority to sell.[4] They are acts distinct in their nature, and not dependent upon, or incidents of each other. But if the shopman has been accustomed to buy as well as to sell, then the presumption of a full authority equally applies to both.[5]

§ 90. The case above supposed is that of a general authority to sell, or to buy, arising from the knowledge and acquiescence of the principal. But the same doctrine will govern in the case, where the act is a single one, if the acquiescence of the principal, with a full knowledge of the facts, is established.[6] Thus, if a person should, in the presence of the principal, sell a parcel of goods of the latter, without objection, as his agent, the tacit consent of the principal to the sale will be presumed, and it will bind him.[7]

[1] 1 Story on Eq. Jurisp. §§ 385–392.

[2] Dig. Lib. 50, tit. 17, l. 60; Lib. 17, tit. 1, l. 18; Ante, § 56; 2 Kent, Comm. Lect. 41 (4th ed.), pp. 614–616; 1 Bell, Comm. 486, art. 410 (4th ed.); Id. pp. 478–480 (5th ed.); 1 Story on Eq. Jurisp. §§ 385–390.

[3] Dig. Lib. 17, tit. 1, l. 6, § 2; Id. l. 53; Ante, § 56.

[4] Ante, § 88; Post, §§ 255, 258; [Spooner *v.* Thompson, 48 Vt. 259].

[5] See 2 Kent, Comm. Lect. 41 (4th ed.), pp. 614–616, 622; Pothier on Oblig. n. 454–456; 1 Domat, B. 1, tit. 16, § 3, art. 1–3; Dig. Lib. 14, tit. 3, l. 5, §§ 11, 12.

[6] Liverm. on Agency, 38, 40 (ed. 1818).

[7] Heane *v.* Rogers, 9 B. & Cressw. 577, 586; Graves *v.* Key, 3 B. & Adolph. 318, note (*a*); Pickard *v.* Sears, 6 Adolph. & Ellis, 469, 474. [Thus where a person assumes in good faith to act for another, but without sufficient authority, the latter, on being informed of the fact, must disavow his action within a reasonable time, at least where his silence would prejudice innocent parties, or he will be held to have ratified the act. Saveland *v.* Green, 40 Wisc. 431. In this case a broker informed the owner of a vessel, at his place of residence, that

§ 91. Indeed, the doctrine of courts of equity goes further; for it is clearly established, that if the true owner of property stands by, and knowingly suffers a stranger to sell the same in his own name, as his own property, without objection, the sale will be valid against the true owner.[1] For under such circumstances, his silence and concealment of his title are treated as equivalent to an affirmation that he has no adverse title to the property; and it would be a gross fraud upon the purchaser, to allow the true owner thus to delude him into a purchase, and afterwards to defeat the supposed rights acquired under it.[2] The same rule will apply to the case, where a person knowing the fact that a deed conveys his own interest in a particular estate, voluntarily subscribes the same deed, as a witness of the due execution thereof by the person who undertakes to convey it.[3] Courts of law, also, as far as they may, in regard to personal property, where no technical formalities are necessary to a transfer, now act upon the same enlightened principles of justice. Thus, where a man, without objection, suffered his own goods to be sold by an officer at public auction, to satisfy an execution against a third person, in whose possession they were at the time, it was held in favor of the purchaser at the sale, that his conduct might well authorize the conclusion that he had assented to the sale, or had ceased to be owner.[4]

he had procured a charter for such vessel, and as the owner did not disaffirm the contract, he was held to have ratified it. So where an agent applies a note belonging to his principal to satisfy a debt of the principal's, the latter is presumed to have ratified the act unless he disaffirm it within a reasonable time. Brigham *v.* Peters, 1 Gray, 139; Darnell *v.* Griffin, 46 Ala. 520; Forsyth *v.* Day, 46 Me. 196. But the mere failure to disavow the unauthorized acts of such agent instantly upon being apprized of them, will not *ipso facto* be a ratification. Miller *v.* Excelsior Stone Co., 1 Ill. App. 278; Thomson *v.* Gardiner, L. R. 1 C. P. D. 777; Caswell *v.* Cross, 120 Mass. 545. In this last case a firm of collection agents issued a circular stating that they would conduct their client's business according to his instructions and treat his debtors "either with delicacy, so as not to offend them, or with such severity as to show that no trifling is intended"; and the defendant having employed them without giving any special instructions, he was held responsible for any damage resulting from their methods. — Ed.]

[1] 1 Story on Eq. Jurisp. §§ 385–395.

[2] Ibid.

[3] Teasdale *v.* Teasdale, Sel. Cas. in Ch. 59; 1 Fonbl. Eq. B. 1, ch. 3, § 4, note (*m*).

[4] Pickard *v.* Sears, 6 Adolph. & Ellis, 469, 474. On this occasion Lord Denman said: "The rule of law is clear, that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and

§ 92. The same rules apply to cases where a clerk accepts or indorses bills or notes for his master, which the master afterwards pays, as legitimately accepted or indorsed; for his acquiescence, under such circumstances, will be treated as equivalent to an affirmance of the authority of the clerk to do such acts.[1] But a clerk, so intrusted to accept or indorse bills or notes, would not thereby possess an authority to purchase, or to sell goods, for his principal.[2] So, payments made to an agent will be good or not, according to his presumed authority, arising from the course of his business.[3] If he is usually intrusted to receive payments and give receipts therefor, the principal will be bound. But if his employment has been limited to other acts, he will not be bound.

§ 93. So, if a person should authorize another to assume the apparent ownership, or right of disposing of property, in the ordinary course of trade, it will be presumed that the apparent authority is the real authority. For, in such a case, strangers can look only to the acts of the parties, and to the external indicia of prop-

induces him to act on that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things, as existing at the same time; and the plaintiff, in this case, might have parted with his interest in the property, by verbal gift or sale, without any of those formalities that throw technical obstacles in the way of legal evidence. And we think his conduct, in standing by and giving a kind of sanction to the proceedings under the execution, was a fact of such a nature, that the opinion of the jury ought, in conformity to Hearn *v.* Rodgers, 9 B. & Cressw. 586, and Graves *v.* Key, 3 B. & Adolph. 318, note, to have been taken, whether he had not, in point of fact, ceased to be the owner." [Forsyth *v.* Day, 46 Me. 176; Rafferty *v.* Haldron, 81½ Pa. St. 438.]

[1] Ante, §§ 55, 78, 87; Post, § 104; [Johnson *v.* Jones, 4 Barb. 369].

[2] See 1 Bell, Comm. 386, 387, art. 410 (4th ed.); Id. pp. 478–482 (5th ed.); 3 Chitty on Com. & Manuf. 196, 197; Ante, § 87; [Kerns *v.* Piper, 4 Watts, 222. See also Hampton *v.* Matthews, 2 Harris, 105].

[3] [The receipt of earnest-money by an assumed agent, who has undertaken without authority to make a contract of sale for his principal, does not bind the principal. Bosseau *v.* O'Brien, 4 Biss. 395. And an interlocutory decree against an insurance company, appointing a receiver and enjoining the company, its officers and agents, from receiving and disposing of the property of the company, except to deliver it to the receiver, does not revoke the authority of an agent to receive a premium on a policy and it cannot be recovered back. Rice *v.* Barnard, 127 Mass. 241. See Noble *v.* Nugent, 89 Ill. 522. So, where a sewing-machine was sold to B. by A., and A.'s agent received part-payment for the same in labor performed for him by B., *held*, that if the agent had authority to make such an agreement, A. could not recover the amount from B. Shaffer *v.* Sawyer, 123 Mass. 294. But see, *contra*, Stewart *v.* Woodward, 50 Vt. 78; Bertholf *v.* Quinlan, 68 Ill. 297. — ED.]

erty, and ought not to be affected by any mere private communications, which pass between the principal and the agent.[1]

§ 94. In like manner, an implied authority may be deduced from the nature and circumstances of the particular act done by the principal. If the principal sends his commodity to a place where it is the ordinary business of the person, to whom it is confided, to sell, it will be intended, that the commodity is sent thither for the purpose of sale. Thus, if the owner of a horse should send it to a repository of sale, it would be implied, that he sent it thither for the purpose of sale. So, if the owner should send goods to an auction room, it would be presumed, that he sent them thither for sale. For, in each of these cases, it could not be supposed, that any other purpose could be intended, such as safe custody, or mere deposit. And, therefore, it may be laid down as a general rule, that when a commodity is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser will be safe, although the agent may have acted wrongfully, and against his orders or duty, if the purchaser has no knowledge thereof.[2]

§ 95. In like manner, the tacit consent or acquiescence of the principal may be deduced from the usual habits of dealing between parties.[3] Thus, if an agent has been in the habit of dealing for his principal, by buying and selling goods on his account on credit, and

[1] Pickering *v.* Busk, 15 East, 38, 43; Dyer *v.* Pearson, 3 B. & Cressw. 38, 42; Morris *v.* Cleasby, 4 M. & Selw. 566; Blackburn *v.* Scholes, 2 Camp. 343; 2 Kent, Comm. Lect. 41, pp. 620, 621 (4th ed.). [Thus, where the owner of the property has permitted his agent in possession to represent himself as the owner, whereby he has obtained credit and incurred a debt for an improvement of the property, the owner is estopped to deny his liability therefor. White *v.* Morgan, 42 Ia. 113. So an agent to whom bills of lading are handed for the purpose of obtaining possession of the cargo of a stranded vessel, has an implied authority to bind the owner by an agreement to pay expenses. Hingston *v.* Wendt, L. R. 1 Q. B. D. 367. So, where an agent is entrusted by the owner with the assignment of a chose in action, executed in blank, the assignee for value from the agent can hold it as against the owner. Hazewell *v.* Coursen, 45 N. Y. Sup. 22. So, where the proprietor of a hotel employed an agent to run it, and held him out as the manager of the house, it was held that such agent had authority to purchase the usual and necessary supplies for the hotel on the proprietor's credit. Beecher *v.* Venn, 35 Mich. 466. See also Fame Ins. Co. *v.* Mann, 4 Ill. App. 485; Guilford *v.* Stacer, 53 Ga. 618; Calais Co. *v.* Van Pelt, 2 Black. 372. — Ed.]

[2] Pickering *v.* Busk, 15 East, 38, 43; 2 Kent, Comm. Lect. 41, p. 621 (4th ed.); [Doubleday *v.* Kress, 60 Barb. (N. Y.) 181]; Ante, § 73, note.

[3] Post, § 260.

full knowledge thereof is brought home to the principal, and no objection is made; the principal is understood by his silence to assent to such purchases and sales on credit, although the usages of trade, or the general course of the business, would not justify such a mode of purchase or sale on credit. For the parties are at liberty to dispense with such usages of trade or business at their pleasure; and the habits of dealing between them afford a full and satisfactory exposition of their intention to dispense with the general rule.[1]

§ 96. In like manner (as we have already seen),[2] the known usages of trade and business often become the true exponents of the nature and extent of an implied authority;[3] for, in all cases, where such usages exist, and an agency is to be exercised touching such matters, the natural presumption, in the absence of all countervailing proofs, is that the agency is to be conducted in the manner, and according to the practices, which are allowed and justified by such usages.[4] Thus, for example, where a stock-broker is authorized to sell, and does sell, stock, and it turns out, for want of a proper stamp, to be unmarketable, and in such cases the usage is for the broker to take it back, and repay the purchase-money, — the broker is warranted in so doing; and if he has, in the mean time, paid over the money to his employer, he may recover it back from him.[5] So, a stock-broker, who has made a contract on behalf of his principal, which the latter cannot complete, is authorized to pay the money necessary and proper to make good the difference, and to meet the loss paid on account of his principal, when that is in accordance

[1] 2 Kent, Comm. Lect. 41, pp. 614–616 (4th ed.); 3 Chitty on Com. & Manuf. 196. [See Eagle Bank *v.* Smith, 5 Conn. 71; Edwards *v.* Thomas, 66 Mo. 468; Broadway Savings Bank *v.* Vorster, 30 La. An. 587; Shelton *v.* Merch. Trans. Co., 59 N. Y. 258; Gallup *v.* Lederer, 1 Hun, 282.]

[2] Ante, §§ 60, 73, 77.

[3] [Grant *v.* Ludlow, 8 Ohio St. 54.]

[4] 1 Bell, Comm. 388, art. 412 (4th ed.); Id. pp. 478–482 (5th ed.); Ante, §§ 60, 73, 77; Post, § 110. [But a clerk in a store has no authority, as such, to borrow money, or draw bills and notes, in the name of his principal. Kerns *v.* Piper, 4 Watts, 222. But in Turner *v.* Keller, 66 N. Y. 66, where G. having failed in business, his brother H. bought out the business, and authorized G. to carry it on in his name, and G. signed notes in H.'s name, which defendant knew were signed by G., and thereupon indorsed them, it was held that these facts authorized an inference that G. had authority to sign the notes for H., and they were therefore H.'s notes. See Hampton *v.* Matthews, 2 Harris, 105. — Ed.]

[5] Young *v.* Cole, 3 Bing. N. Cas. 724.

with the rules established at the Exchange, although these rules may not be known to the principal.[1] Indeed, so true is this doctrine, that, under ordinary circumstances, a deviation from such usages will, if a loss should occur therefrom, exclusively fall upon the agent, even though he acted with an anxious desire to promote the interests of his principal thereby.[2] And, on the other hand, if the agent conducts his business according to such usages, he will be exonerated from all responsibility, even if it could be shown, that by a deviation from them he might have acted more beneficially for his principal.[3]

§ 97. In the next place, as to the incidents, which are implied by law from the direct or principal authority. We have already had occasion to state, that every such authority carries with it, or includes in it, as an incident, all the powers, which are necessary, or

[1] Sutton *v.* Tatham, 10 Adolph. & Ellis, 27. [And, in general, where a contract for the purchase and sale of stocks is made through brokers, members of the Stock Exchange, the usages and rules of the Stock Exchange become part and parcel of such contract. Bowring *v.* Shepherd, L. R. 6 Q. B. 309. And these usages and rules were held to make all stock-brokers principals as between themselves, but not to free an undisclosed principal from liability. Mortimer *v.* McCallan, 6 M. & W. 58. But a custom for the broker to buy goods in his own name, and to supply his principal with such goods, when employed by him to purchase, was held to be a peculiar one; and as the principal did not know the usage, he was not bound by it. Robinson *v.* Mollett, L. R. 7 H. L., 802. So, the custom among brokers to sell stocks, deposited as collateral security for a call loan, on the failure of the borrower to pay on the day on which demand is made, was held to be good only with parties familiar with such custom. Colket *v.* Ellis, 10 Phil. 375. So, the custom among brokers in Baltimore that a pledgee has no right to surrender pledged stock and have re-issues in his own name, but must retain the identical stock until default. Rich *v.* Boyce, 39 Md. 314. And it has been held that a party, by directing plaintiff, a broker, to purchase shares, necessarily gave him authority to pay for them according to the rules of the Stock Exchange, Taylor *v.* Stray, 2 C. B. N. S. 175; and that a broker could recover the money paid by him for his principal for stock purchased according to the usage of the market, Smith *v.* Lindo, 5 C. B. N. S. 587; Pidgeon *v.* Burslem, 3 Ex. 465. And where the broker purchased scrip for his principal, which turned out not to be genuine, he was held not liable if he purchased what was sold in the market as such scrip. Lamert *v.* Heath, 15 M. & W. 486. See also Bailey *v.* Bensley, 87 Ill. 566; Walker *v.* Walker, 5 Heisk. (Tenn.) 425; White *v.* Fuller, 67 Barb. 267; Wanless *v.* McCandless, 38 Ia. 20; Gilchrist *v.* Brooklyn Manuf. Ass., 66 Barb. 390. — Ed.]

[2] Russell *v.* Hankey, 6 T. R. 12; Belchier *v.* Parsons, Ambler, 219, 220; Caffrey *v.* Darby, 6 Ves. 496; Massey *v.* Banner, 1 Jac. & Walk. 241, 248, 249; 3 Chitty on Com. & Manuf. 197, 199.

[3] Moore *v.* Mourgue, Cowp. 480; Smith *v.* Cologan, 2 T. R. 188, note (*a*); Russell *v.* Hankey, 6 T. R. 12; Belchier *v.* Parsons, Ambler, 219, 220; Warwick *v.* Noakes, Peake, 68; 2 Kent, Comm. Lect. 41, pp. 622–624 (4th ed.).

proper, or usual, as means to effectuate the purposes for which it was created.[1] In this respect, there is no distinction, whether the authority given to an agent is general or special, or whether it is express or implied. In each case it embraces the appropriate means to accomplish the desired end.[2] Thus (as we have seen), where an agent is employed to procure a negotiable bill or note, belonging to his principal, to be discounted, he may, unless specially restricted, indorse it in the name of the principal, and bind him by the indorsement.[3] So, an order to send goods to the principal from a foreign country, implies a power to ship them generally, so as to bind both the principal and the goods for the freight.[4]

§ 98. In some cases, the nature and extent of the incidental authority turn upon very nice considerations, either of actual usage, or of implications of law. Thus, an agent, employed to make, or negotiate, or conclude a contract, is not, as of course, to be treated as having an incidental authority to receive payments, which may become due under such contract.[5] An agent, authorized to take a bond,

[1] Ante, §§ 58–60, 73, 85–88; [Williams *v.* Getty, 31 Penn. St. 461. A foreman porter in the service of a railway company, who, in the absence of the station-master, is in charge of the station, has no implied authority to give in charge a person whom he suspects to be stealing the company's property; and if he gives in charge on such suspicion an innocent person, the company are not liable. Edwards *v.* The London & North Western Railway Co. L. R. 5 C. P. 445. A clerk in the service of a railway company, whose duty it is to issue tickets to passengers, and receive the money, and keep it in a till under his charge, has no implied authority from the company to give into custody a person whom he suspects has attempted to rob the till, after the attempt has ceased; as such arrest could not be necessary for the protection of the company's property. And the company therefore is not liable for the act of the clerk. Allen *v.* The London & South Western Railway Co. L. R. 6 Q. B. 65. — G.].

[2] 1 Bell, Comm. 387, art. 412 (4th ed.); Id. pp. 478–482 (5th ed.); Ante, § 58; Howard *v.* Baillie, 2 H. Bl. 618; 3 Chitty on Com. & Manuf. 198–200; 1 Domat, B. 1, tit. 15, § 3, art. 10; Id. B. 1, tit. 16, § 3, art. 1, 2; Damon *v.* Inhab. of Granby, 2 Pick. 345; Ante, §§ 58–60, 73, 85–88.

[3] Ante, § 59; Fenn *v.* Harrison, 3 T. R. 757; s. c. 4 T. R. 177; 1 Bell, Comm. 387, art. 412 (4th ed.); Id. pp. 478–482 (5th ed.); [People *v.* No. Amer. Bank, 75 N. Y. 547].

[4] 1 Bell, Comm. 387, art. 412 (4th ed.); Id. pp. 478–482 (5th ed.); Molloy de Jure Marit. B. 3, ch. 8, § 9.

[5] 3 Chitty on Com. & Manuf. 207, 208; Whitlock *v.* Waltham, 1 Salk. 157; Peck *v.* Harriot, 6 Serg. & R. 149; Wostenholm *v.* Davies, 2 Freem. 289; Henn *v.* Conisby, 1 Ch. Cas. 93; Gerard *v.* Baker, 1 Ch. Cas. 94, note; Duchess of Cleveland *v.* Dashwood, 2 Eq. Abridg. 709; [Puttock *v.* Ware, 3 Hurl. & Norm. 979 (Am. ed.); Williams *v.* Walker, 2 Sandf. Ch. 225; Kornemann *v.* Monaghan, 24 Mich. 36; Doubleday *v.* Kress, 50 N. Y. 410].

is not to be deemed, as of course, entitled to receive payment of the money due under that bond. But, if he is intrusted with the continued possession of that bond, an implication of such authority may be deduced from that fact, in connection with the other.[1] So, an agent, authorized to receive payment, has not an unlimited authority to receive it in any mode which he may choose; but he is ordinarily deemed intrusted with the power to receive it in money only.[2] So, an agent, intrusted to receive payment of a negotiable or other instrument, is ordinarily deemed entitled to receive it only, when and after, it becomes due, and not before it becomes due.[3] But if there be a known usage of trade, or course of business in a particular employment or habit of dealing between the parties, extending the ordinary reach of the authority, that may well be held to give full validity to the act.[4]

§ 99. Upon similar grounds, an agent employed to receive payment is not, unless some special authority beyond the ordinary reach is given to him, clothed with authority to commute the debt for another thing; or to compound the debt; or to release it upon a composition;[5] or to pledge a note received for the debt, or the

[1] Ibid. [The River Clyde Trustees *v.* Duncan, 25 Eng. Law & Eq. 19.]

[2] Smith on Merc. Law, B. 1, ch. 5, § 4, pp. 124, 125 (3d ed. 1843); Favenc *v.* Bennet, 11 East, 36; Blackburn *v.* Scholes, 2 Camp. 341; Todd *v.* Reid, 4 B. & Ald. 210; Russell *v.* Bangley, 4 B. & Ald. 395; Bartlett *v.* Pentland, 10 B. & Cressw. 760; Scott *v.* Irving, 1 B. & Adolph. 605; Barker *v.* Greenwood, 2 Y. & Coll. 414; Post, §§ 181, 215, 413, 429, 430; [Underwood *v.* Nicholls, 17 C. B. 239; Stewart *v.* Aberdein, 4 M. & W. 211. In Sweeting *v.* Pearce, 7 C. B. N. S. 449, Byles, J., says, "The general rule of law is that an authority to an agent to receive money implies that he is to receive it in cash. If the agent receives the money in cash, the probability is that he will hand it over to his principal. But if he is allowed to receive it by means of a settlement of an account between himself and the debtor, he might not be able to pay it over. At all events, it would very much diminish the chance of the principal's ever receiving it; and upon that principle it has been held that the agent cannot, as a general rule, receive payment in anything else than cash. Unless, therefore, there is some usage to control it, payment to the agent must be made in money." Or unless the agent is especially authorized by his principal to receive payment in some other form. Drain *v.* Doggett, 41 Ia. 682. But no custom, unless ancient, uniform, notorious, and reasonable, can authorize an agent, when directed to sell for cash, to receive a check payable the day after the sale. Hoel *v.* Storrs, 7 Wisc. 253; Higgins *v.* Moore, 34 N. Y. 422; Bridges *v.* Garrett, L. R. 5 Com. Pl. 451; Aultman *v.* Lee, 43 Ia. 404; Bertholf *v.* Quinlan, 68 Ill. 297. — Ed.].

[3] See Campbell *v.* Hassell, 1 Stark. 233; Parnther *v.* Gaitskell, 13 East, 437, per Bayley, J.

[4] Ibid.; 3 Chitty on Com. & Manuf. 207, 208.

[5] 3 Chitty on Com. & Manuf. 207–209. [Thus, an authority to an agent to

money when received;[1] or to submit the debt or demand to arbitration;[2] unless, indeed, the particular employment of the agent, or the general usage of business, or the habits of dealing between the parties, should raise a presumption the other way. The same principles seem to have been fully recognized and acted on in the civil law.[3]

§ 100. Incidental powers are generally deduced either from the nature and objects of the particular act or agency, or from the particular business, employment, or character of the agent himself.[4] In some cases, the deduction is, in the absence of all contrary proofs, a mere inference of law; in others, it is a mere matter of fact, or an inference of fact; in others, again, it is a mixed question of law and fact.[5] It may not be without use to give a few additional illustrations of these suggestions, although a thorough review of all the cases would necessarily occupy a disproportionate space in the present commentaries.

§ 101. And, first, as to the incidental powers by inference or

collect and receive moneys does not authorize him to extend the time of payment, Ritch *v.* Smith, 82 N. Y. 627: nor to receive the debtor's note for it, McCullock *v.* McKee, 4 Harris, 289: nor does the authority to receive payment of a note include the power to make any other arrangement with regard to it, although it may be a benefit to the owner, Woodbury *v.* Larned, 5 Minn. 339: nor has an agent "to sell safes, exchange safes, and collect notes" any authority to release a debt contracted in the course of such business, Herring *v.* Hottendorf, 74 N. C. 588: nor can an agent release or exchange the security for the balance of a debt, on receiving part payment, McHany *v.* Schenck, 88 Ill. 357: nor can an agent give a receipt in full where only a part of the debt is paid, Pratt *v.* The United States, 3 Nott & Hunt. 106: nor does authority to sell property include authority to receive payment for the same, especially when the principal is known to the vendee, Higgins *v.* Moore, 34 N. Y. 417; Catterall *v.* Hindle, L. R. 1 C. P. 186: nor does an authority to make a loan, and to receive securities therefor, include power to receive payment for the note given for the money loaned, Austin *v.* Thorpe, 30 Ia. 376: and an authority to receive checks in lieu of cash in payment of bills held for collection, does not confer authority to indorse and collect the checks, Graham *v.* U. S. Savings Inst. 46 Mo. 186: and a power of attorney to sell and convey does not authorize a voluntary conveyance to an agent to enable him to control and protect the property, Dupont *v.* Wertheinan, 10 Cal. 354. — Ed.]

[1] Hays *v.* Lynn, 7 Watts, 524; Jones *v.* Farley, 6 Greenl. 226; Ante, § 78; Post, § 113, and note.

[2] Caldwell on Arbitrations, 14, 15, 152, 153; Goodson *v.* Brooke, 4 Camp. 163. [And see Scarborough *v.* Reynolds, 12 Ala. 252.]

[3] 1 Domat, B. 1, tit. 15, § 3, art. 11; Dig. Lib. 3, tit. 3, l. 60; Ante, § 70.

[4] [See Hearne *v.* Keene, 5 Bosw. 585.]

[5] 3 Chitty on Com. & Manuf. 198–201; Ante, §§ 58–60, 83.

intendment of law.[1] A bailiff of a manor (it is said) may make leases at will without any special authority; although he cannot make leases for years. The reason commonly assigned for this distinction is, that the appropriate business of such a bailiff is only to collect rents, gather fines, look after forfeitures, and to do other acts of a like nature, for the lord. But he hath no estate or interest in the manor itself; and, therefore, he cannot contract for any certain interest thereout, but he must have a special power for that purpose. But he may make leases at will without any special authority; because being appointed to collect and answer the rents of the manor to his lord, if he could not make leases at will, the lord might sustain great prejudice in case of his own absence, sickness, or other incapacity to make leases, when any of the former leases were expired. And such leases at will are for the benefit of the lord, and can be no ways prejudicial to him; because he may determine his will, when he may think fit.[2] But the bailiff of an estate has no implied authority to pledge the credit of his principal by drawing or indorsing bills of exchange, although he is the party through whose hands all receipts and payments respecting the estate take place.[3]

§ 102. Upon a similar ground of incidental authority by operation of law, an authority to buy or sell goods includes the authority to execute the proper vouchers therefor; an authority "to do the needful," in respect to the fulfilment of an award, carries the incidental power to prepare a release, if required by the award;[4] an authority to superintend the building of a meeting-house, to procure an architect, and to borrow money, if necessary, includes an authority to make the necessary contracts for the building of the meeting-house;[5] an authority to sell a horse includes a power to warrant

[1] See Howard *v.* Baillie, 2 H. Bl. 618.

[2] Bac. Abridg. *Leases and Terms for Years*, I. 8. See Cro. Jac. 177, 178. It may deserve consideration whether this doctrine is applicable to the modern cases of a lease at will, when construed to be a lease from year to year, or to any leases, except those which are strictly leases at will. In Rolle's Abridg. title *Bailiffe*, l. 25, it is laid down, that a bailiff of a manor may make a lease of a piscary for years, for which he cites 3 Hen. IV. 12 b. But although the point arose in that case, it does not seem to have been decided by the court, for the cause went off upon another issue. See Brooke, Abridg. *Baillie*, pl. 40, 41.

[3] Davidson *v.* Stanley, 2 Mann. & Gr. 721; Ante, §§ 58, 59.

[4] Dawson *v.* Lawley, 4 Esp. 66; Ante, §§ 58-60, 83.

[5] Damon *v.* Inhab. of Granby, 2 Pick. 345.

him;[1] a power to sell goods includes a power to warrant them;[2] a power to buy a thing, without any statement at what price, includes the power to buy at any price;[3] a power to deliver seisin of lands includes the power to enter upon a lessee of the land, in order to make the livery;[4] a power to sell goods includes a power to receive payment on the sale;[5] a power to recover and receive a debt includes the power to sue for the debt, and upon payment to make a proper release or discharge of the debtor.[6]

[1] Ibid.; Ante, §§ 58, 59; Helyear *v.* Hawke, 5 Esp. 73–75; 2 Kent, Comm. Lect. 41, pp. 617, 618, 621 (4th ed.); 3 Chitty on Com. & Manuf. 198–201. [Thus, where B. was authorized by the owner of a horse to sell him, without further restriction, it was held that a warranty by B. to the purchaser would bind the owner, Tice *v.* Gallop, 5 Thomp. & C. 51; Schuchardt *v.* Allen, 1 Wall. 359; Bradford *v.* Bush, 10 Ald. 386: but the rule laid down in the text has been received with some hesitation. See Scott *v.* McGrath, 7 Barb. 53; Bryant *v.* Moore, 26 Me. 84; Lipscombe *v.* Kitrell, 11 Humph. 256. — Ed.]

[2] Andrews *v.* Kneeland, 6 Cowen, 354. [A power to sell includes a power to warrant the title, and quality of the thing sold, but not to give unusual warranties. Palmer *v.* Hatch, 46 Mo. 585. And a power to sell imports power to receive payment, unless the buyer had notice to the contrary, Collins *v.* Newton, 7 Baxter (Tenn.), 269; Peck *v.* Harriot, 6 Serg. & R. 146; Hoskins *v.* Johnson, 5 Sneed, 469: but such payment must be received at the time of sale, and not at some subsequent time, unless there be some other proof of authority than a mere power of sale, Seiple *v.* Irwin, 30 Pa. St. 513; Law *v.* Stokes, 32 N. J. L. 249. A simple power to sell does not authorize a sale at auction. Towle *v.* Leavitt, 3 Foster, 360. But an authority to purchase wheat confers the power to give directions as to its delivery. Owen *v.* Brockschmidt, 54 Mo. 285. So, where an agent, having money placed in his hands, with undisputed power to loan, manage, and collect, as he should deem best, makes an agreement for an extension of time, his principal is bound thereby. Hurd *v.* Marple, 2 Ill. App. 402. And an authority to buy goods, if the agent is not furnished with money for that purpose, confers the power to buy on credit. Sprague *v.* Gillett, 9 Met. 91; Bank of Indiana *v.* Bugby, 1 Abb. App. Cas. 86. And the power to pay debts includes the power to compromise a disputed claim. Bergenthal *v.* Fiebranz, 48 Wisc. 435. — Ed.]

[3] Dig. Lib. 17, tit. 1, l. 3, § 1.

[4] 1 Liverm. on Agency, 105, 106 (ed. 1818); Co. Litt. 52 b.

[5] Capel *v.* Thornton, 3 Carr. & Payne, 352. But see Mynn *v.* Joliffe, 1 Mood. & Rob. 326, cited Post, § 108, note.

[6] Ante, §§ 58–60; 1 Domat, B. 1, tit. 15, § 3, art. 10; Com. Dig. *Attorney*, C. 15, citing Palmer, 394. The civil law (as we have seen) adopted the same doctrine. Ad rem mobilem petendam datus Procurator, ad exhibendum recte aget. Dig. Lib. 3, tit. 3, l. 56. Mr. Chitty (3 Chitty on Com. & Manuf. 210) has laid it down as a general proposition, that, where an agent has any beneficial interest in the performance of the contract for commissions, &c., he may bring an action on the contract in his own name, though the principal may also sue in the same case. And he illustrates his remark by stating the case of a factor, a broker, an auctioneer, a policy broker, whose name is on

§ 103. Upon grounds nearly similar, it has been held, that an agent to insure, has an incidental authority to abandon the property insured to the underwriters, in the case of a total loss.[1] So, an agent to insure has, if the policy remains in his hands, an incidental authority to receive payment of losses thereon.[2] So, an agent, employed to subscribe a policy for the principal, has an implied authority to adjust the loss upon the same policy; and to receive payment in money; but not to receive payment in any other manner.[3] So, an agent authorized to buy a cargo for his principal, if no other means or funds are provided, has an incidental authority to give notes, or draw and negotiate bills on his principal for the amount.[4]

§ 103 *a*. In like manner, wherever a payment, if made by or to an agent, would be a good payment, and bind the principal as being within the scope of the employment of the agent, or otherwise authorized by the principal, there a tender of payment by or to an agent will in like manner be deemed a good tender to or by the principal, and bind the parties accordingly.[5]

the policy, and a ship-master for freight; in all which cases, he says, the agent may sue in his own name. The case of a broker, unless he is also a factor, or named in the contract, does not justify his position. And it is far from being generally true, that an agent, who has an interest in the contract for his commissions, may therefore sue. He can sue only, when, in contemplation of law, he, as well as his principal, is a party to the contract. Thus, if a factor should sell goods, and take a negotiable note in the name of the principal for the amount of the sales, he could not sue on the note so given in his own name, notwithstanding his commissions for the sale were included in the note. Ante, §§ 98, 101; Post, §§ 391–404, 422, 450.

[1] Chesapeake Ins. Co. *v.* Stark, 6 Cranch, 268, 272; 1 Emerig. Assur. ch. 5, § 4, pp. 141, 142; Ante, § 58; [Standard Oil Co. *v.* Triumph Ins. Co., 64 N. Y. 85].

[2] Bousfield *v.* Creswell, 2 Camp. 545; Ante, § 58; Post, § 191.

[3] Richardson *v.* Anderson, 1 Camp. 43, n.; Todd *v.* Reid, 4 B. & Ald. 210; Ante, § 58. The case of an insurance broker illustrates the general principle in a very clear manner. He has acquired, by usage, a known authority to adjust the loss, and receive payment thereof. But his authority to receive payment is, by the same usage, restricted to recovering payment in money; and he cannot receive it so as to bind his principal in any other manner. Russell *v.* Bangley, 4 B. & Ald. 395; Bartlett *v.* Pentland, 10 B. & Cressw. 760; Scott *v.* Irving, 1 B. & Adolph. 605; Campbell *v.* Hassell, 1 Stark. 233; Ante, § 58.

[4] Perrotin *v.* Cucullu, 6 La. 587; Ante, §§ 58, 59.

[5] Smith on Merc. Law, pp. 124, 125 (3d ed. 1843); Moffatt *v.* Parsons, 5 Taunt. 307; Goodland *v.* Blewith, 1 Camp. 477; Kirton *v.* Braithwaite, 1 Mees. & Wels. 310; Post, § 413; [Manhattan Life Ins. Co. *v.* La Pert, 52 Tex. 504].

§ 104. In the next place, as to the cases of incidental authority, as a mere inference of fact from the peculiar circumstances of the case. Thus, if a merchant has been in the habit of allowing particular clerks in his counting-house to sign and indorse notes on his account, this will furnish an inference, that it is incidental to their authority as such clerks, although not otherwise properly pertaining to their duties.[1] So, if an agent takes a bond for his principal, and is allowed to retain possession of it, it is presumed, that he possesses an incidental authority to receive the money which is due on it.[2] And, generally, the possession of a negotiable instrument is deemed sufficient *primâ facie* evidence of the title of the possessor to receive payment of it.[3]

§ 105. In the next place, as to cases where the question of incidental authority is a mixed question of law and fact. This most commonly arises where the point turns upon the consideration, whether the agent is a general or a special agent; or whether, if a general agent, his special instructions are known to the other party. In each of these cases, the ultimate decision must rest, partly upon principles of law, and partly upon facts, limiting or controlling the application of those principles. Thus, if a person be a general agent, his acts, as such, will bind his principal, although he may have received private instructions narrowing or withdrawing his authority.[4] But if those instructions are known to the other party, dealing with him, then those instructions become, as to such person, the sole guide and authority, by which to measure the extent of the rights and duties of the agent.[5]

[1] Dyer *v.* Pearson, 3 B. & Cressw. 38, 42; Whitehead *v.* Tuckett, 15 East, 409, 410; Thorold *v.* Smith, 11 Mod. 87, 88; 3 Chitty on Com. & Manuf. 199, 200; Smith on Merc. Law, pp. 124, 125 (3d ed. 1843); Ante, §§ 59, 92; [Smith *v.* East India Co. 16 Sim. 76. The delivery of a package to a clerk of the agent of an express company outside the office of such agent, is not such a delivery to said company as to make them liable for the loss thereof, although such clerk was accustomed to receive such packages in the office of the agent, and receipt for them there. Cronkite *v.* Wells, 32 N. Y. Ct. Ap. 247; People *v.* No. Am. Bank, 75 N. Y. 547; Edwards *v.* Thomas, 66 Mo. 468].

[2] Whitelocke *v.* Waltham, 1 Salk. 157; [The River Clyde Trustees *v.* Duncan, 25 Eng. Law & Eq. 19; Williams *v.* Walker, 2 Sandf. Ch. 225].

[3] Owen *v.* Barrow, 4 Bos. & Pull. 103; [Hatfield *v.* Reynolds, 34 Barb. 612;] Anon. 12 Mod. 546; [Cone *v* Brown, 15 Rich. (S. C.) 262;] 3 Chitty on Com. & Manuf. 207, 208.

[4] Ante, § 73; Post, §§ 127, 128, 443.

[5] See Ante, § 73; 2 Kent, Comm. Lect. 41, pp. 620, 621 (4th ed.); 3 Chitty on Com. & Manuf. 198–200.

§ 106. But, by far the largest portion of incidental powers is deduced from the particular business, employment, or character of the agents themselves. Whatever acts are usually done by such classes of agents; whatever rights are usually exercised by them; and whatever duties are usually attached to them; all such acts, rights, and duties are deemed to be incidents of the authority confided to them in their particular business, employment, or character.[1] These, indeed, are in some cases so well known and so well defined in the common negotiations of commerce, and by the frequent recognitions of courts of justice, as to become matters of legal intendment and inference, and not to be open for inquiry or controversy. In other cases, indeed, they may be fairly open, as matters of fact, to be established by suitable proofs.[2] Thus, for example, the general incidental authorities, rights, and duties of auctioneers, of brokers, of factors, of cashiers of banks, of masters of ships, and of partners, are in general so well known and defined, as to be propounded as matters of law, not open to be discussed before a jury. Perhaps it may not be without use, even at the hazard of some repetition, to state some of the incidental powers of these classes of agents, which have been familiarly recognized in courts of justice, as they will, at the same time, suggest, some of the correspondent limitations upon these powers, and show their proper extent and determination.

§ 107. And, first, as to auctioneers. We have already had occasion to consider the nature and character of this class of agents, and to refer to the fact, that for some purposes, an auctioneer is deemed the agent of both parties.[3] Thus, he has an incidental authority, *virtute officii*, to bind both the seller and the purchaser, by his memorandum of the sale and purchase.[4] He has also an incidental authority to sue the purchaser in his own name, as being in some

[1] Pothier on Obligations, by Evans, n. 454–456; 1 Domat, B. 1, tit. 16, § 3, art. 1–3. [An agent of a railroad company has no implied power to bind the company by a contract for transportation beyond the termini of its road, where the making of such contracts is not a portion of the established business of the road. Burroughs *v.* Norwich & Worcester R. R. Co. 100 Mass. 26; Wait *v.* Albany & Susquehanna R. R. Co. 5 Lans. 475. — G.]

[2] 3 Chitty on Com. & Manuf. 20.

[3] Ante, § 27; 3 Chitty on Com. & Manuf. 281. [But he cannot act for himself or any other person in bidding for the property sold. Brock *v.* Rice, 27 Grat. 812. In the case of Hood *v.* Adams, 128 Mass. 207, the auctioneer bought in the property for the plaintiff, and it was held that he had no authority to do so.— Ed.]

[4] Ante, § 27; Williams *v.* Millington, 1 H. Bl. 85; 3 Chitty on Com. & Manuf. 292.

sort, not merely an agent, but a contracting party.[1] He has also a right to prescribe the rules of bidding, and the terms of sale.[2] And his verbal declarations at the sale, at least where they do not contradict the written particulars of the sale, are admissible against the principal and binding on him, as an incident to his authority to sell.[3]

§ 108. On the other hand, an auctioneer is deemed the agent of the seller at the sale only; and, therefore, after the sale is made, he has no incidental authority to deal with the purchaser as to the terms, upon which a title is to be made, without some special authority for that purpose.[4] He cannot delegate his authority to another person; not even to his own clerk.[5] He cannot sell on credit;[6] neither can he sell at private sale.[7]

[1] Ante, § 27; Williams *v.* Millington, 1 H. Bl. 81, 84, 85; 3 Chitty on Com. & Manuf. 210; Robinson *v.* Rutter, 30 Eng. Law & Eq. 401; 4 El. & Bl. 954; Atkyns *v.* Amber, 2 Esp. 493; Post, § 397; [Dickenson *v.* Naul, 4 B. & Ad. 638; Grice *v.* Kenrick, L. R. 5 Q. B. 340].

[2] [Where an auctioneer delivered the goods to the wrong party, it was held that the catalogue and conditions given by him were evidence that he had contracted personally, and that he was liable for the non-delivery of the goods. Woolfe *v.* Horne, L. R. 2 Q. B. D. 355. An auctioneer can reserve out of the proceeds of the sale, his commissions and the expenses of the sale. Succession of Dowler, 29 La. Ann. 437; but he must make a sale in order to earn his fees, and is not entitled to charge for an adjournment. Ward *v.* James, 15 N. Y. Sup. 526. — Ed.]

[3] Gunnis *v.* Exhart, 1 H. Bl. 289; Howard *v.* Braithwaite, 1 Ves. & B. 209, 210; Powell *v.* Edmunds, 12 East, 6; Ogilvie *v.* Foljambie, 3 Meriv. 53. Whether an auctioneer has, *virtute officii*, a right to warrant the goods, does not seem to be perfectly clear upon the authorities. In the case of The Monte Allegre, 9 Wheat. 645, 647, it was laid down, that sales at auction in the usual mode are never understood to be accompanied by a warranty. And it was added, that auctioneers are special agents, and have only authority to sell, and not to warrant, unless specially instructed so to do. The authorities cited in support of the text seem to inculcate a more modified doctrine. But in cases of judicial sales by marshals, and other public officers, they have no authority to warrant. [Port *v.* The United States, 1 Dev. Court of Claims; Puckett *v.* The United States, Id.; Yates *v.* Bond, 2 McCord, 382; Bashore *v.* Whisler, 3 Watts, 490.]

[4] Seton *v.* Slade, 7 Ves. 276.

[5] Ante, §§ 13, 29; Coles *v.* Trecothick, 9 Ves. 234.

[6] 3 Chitty on Com. & Manuf. 218, and cases there cited. See Ante, § 60. [An auctioneer has no authority to receive as payment a check upon a bank in which it turns out that the purchaser has no funds. Broughton *v.* Sillaway, 114 Mass. 71. And where an auctioneer, who is authorized to sell goods for cash, receives a bill of exchange, which falls due and is paid to him after his authority to sell is revoked, the owner of goods can still sue the purchaser and recover the price of the goods. Williams *v.* Evans, L. R. 1 Q. B. 352. — Ed.]

[7] Ante, § 27. Whether an auctioneer has authority to receive the whole pur-

§ 109. Secondly, as to brokers. These, as we have seen, have an incidental authority to sign the contract for, and as the agent of, both parties.[1] A broker employed to effect a policy, has an incidental authority to adjust losses upon it; and, if employed to settle losses, he has authority to refer a disputed loss to arbitration.[2] A broker, employed to buy or sell without limitation of price, has the incidental authority to bind his principal by any price, at which he honestly buys or sells.[3] So, a broker, authorized to sell goods without any express restriction as to the mode, may sell the same by sample or with warranty.[4] Ordinarily, he cannot make the contract in his own name; but ought to do it in the name of the principal.[5] There are exceptions, however, by the usages of trade, as in cases of policies of insurance, which are usually made in the name of the policy broker, and he may then sue thereon.[6] So, he cannot buy or sell on credit, except in cases justified by the usages of trade.[7]

chase-money on a sale of real estate, or only the deposit, may admit of some question. It was said, in argument by counsel, in Mynn *v.* Joliffe, 1 Mood. & Rob. 326, that he had only a right to receive the deposit. And it was held by Littledale, J., in the same case generally, that "an agent employed to sell [an estate] has no authority, as such, to receive payment." See, as to sale of personal chattels, Capel *v.* Thornton, 3 Carr. & Payne, 352, and Ante, §§ 27, 102.

[1] Ante, §§ 28–32. [A broker has implied authority to sign a bought-and-sold note, and so bind both parties, Parton *v.* Crofts, 16 C. B. N. S. 11; Greaves *v.* Legg, 34 Eng. L. & Eq. 489: but he has no implied authority to make the freight under a charter-party, entered into by him for his principal, payable to himself, Walshe *v.* Provan, 8 Exch. 843: nor has a broker employed to make sales for his principal any authority to submit his principal's case to arbitration so as to bind his principal, Ingraham *v.* Whitmore, 75 Ill. 24: and in an action on a broker's note the defendant can show that the contract signed by the broker was not the real contract between the parties, which was a sale by sample, Remick *v.* Sanford, 118 Mass. 102: and a cotton-broker who was authorized to deliver a bill of lading only upon payment of a bill of exchange, cannot bind his principal by delivery without such payment, Stollenwerck *v.* Thacher, 115 Mass. 224; Ante, §§ 28–32. — Ed.]

[2] Ante, § 58; Richardson *v.* Anderson, 1 Camp. 43, note; Goodson *v.* Brooks, 4 Camp. 163; 1 Emerig. ch. 5, § 4, p. 141 (ed. Boulay Paty).

[3] East India Co. *v.* Hensley, 1 Esp. 111; [Wilkinson *v.* Churchill, 114 Mass. 184].

[4] Andrews *v.* Kneeland, 6 Cowen, 354; The Monte Allegre, 9 Wheat. 643, 644.

[5] 1 Domat, B. 1, tit. 17, § 1, art. 1; Ante, §§ 28–32.

[6] 3 Chitty on Com. & Manuf. 210; Baring *v.* Corrie, 2 B. & Ald. 137; Post, §§ 161, 272, 394.

[7] Ante, § 60; Henderson *v.* Barnewell, 1 Y. & Jerv. 387; [Boorman *v.* Brown, 3 Q. B. 511].

So, a broker has ordinarily no authority, *virtute officii*, to receive payment for property sold by him; and if payment is made to him by the purchaser, it is at his own risk, unless from other circumstances the authority can be inferred.[1] A broker also has no power to delegate his own authority to another person.[2]

§ 110. Thirdly, as to factors. Factors, as we have seen, may sell in their own name the goods of their principal; and they may buy goods in the like manner for their principal; and in each case the principal will be bound by their acts, in the same way, and to the same extent, as if his own name were used.[3] They have also an incidental authority to sell on credit, where the usage of trade justifies it.[4] So, factors, employed to ship goods, as well as to buy goods for their principal, have an incidental authority to bind the latter to the payment of the freight.[5] And where they have a

[1] Baring *v.* Corrie, 2 B. & Ald. 137; Campbell *v.* Hassell, 1 Stark. 233. Insurance brokers are considered as having, by usage, an authority to adjust losses, and to receive payment of them. Ante, §§ 58, 103; Todd *v.* Reid, 4 B. & Ald. 210; Scott *v.* Irving, 1 B. & Adolph. 605; Bousfield *v.* Cresswell, 2 Camp. 545; 1 Liverm. on Agency, ch. 8, § 2, p. 356 (ed. 1818); Richardson *v.* Anderson, 1 Camp. 43, note; 1 Emerig. ch. 5, § 4. But then they are restricted to the receiving of money in payment; and are not at liberty to receive payment in any other manner, unless, indeed, there is a clear usage of trade governing the case. Ante, §§ 98, 103, and note; Post, §§ 181, 413, 430; Todd *v.* Reid, *ubi supra;* Russell *v.* Bangley, 4 B. & Ald. 395; Bartlett *v.* Pentland, 10 B. & Cressw. 760; [Shee *v.* Clarkson, 12 East, 507; Walshe *v.* Provan, 8 Ex. 843; Higgins *v.* Moore, 34 N. Y. 417; Fame Ins. Co. *v.* Mann, 4 Ill. Ap. 485; Butler *v.* Dorman, 68 Mo. 298].

[2] Ante, §§ 13, 29.

[3] Ante, § 34.

[4] Ante, § 60; Post, §§ 209, 226; 1 Domat, B. 1, tit. 16, § 3, art. 1, 2; Greely *v.* Bartlett, 1 Greenl. 172; Forestier *v.* Bordman, 1 Story, 43. [Although the factor is authorized to sell on credit, except where the usage of trade is otherwise, he will be held to a very close examination of the credit of parties to whom he sells; and any inattention in this respect will make him liable for any loss. Foster *v.* Waller, 75 Ill. 464; Burton *v.* Goodspeed, 69 Ill. 237; Byrne *v.* Schwing, 6 B. Monroe, 199; Daylight Burner Co. *v.* Odlin, 51 N. H. 56; Ernest *v.* Stoller, 5 Dillon, C. C. 438. But an order to a commission merchant to sell at once, accepting a certain offer, will not authorize him to sell on credit to a party known to him to be irresponsible. Durant *v.* Fish, 40 Ia. 559. — Ed.]

[5] 3 Chitty on Com. & Manuf. 198, 199; 2 Kent, Comm. Lect. 41, pp. 619, 620 (4th ed.). [But see Day *v.* Crawford, 13 Geo. 508. Factors, like other agents, are bound to obey the instructions received from their consignors, Evans *v.* Root, 13 Selden, 186; Johnson *v.* Wade, 2 Bax. (Tenn.) 480; Day *v.* Crawford, 13 Ga. 508: unless the consignors have failed to keep "up the margin" over the advances, Hornsby *v.* Fielding, 10 Heisk. 367; Moeller *v.* McLagan, 60 Ill. 317; Kraft *v.* Fancher, 44 Md. 204; Rice *v.* Montgomery, 4 Biss. 75: or,

general authority to buy, or to sell, they are treated as general agents, and their acts bind their principal, even though they have violated their private and secret instructions. But factors cannot ordinarily delegate their authority to other persons.[1]

§ 111. Factors have also a special property in the goods consigned to them; and for many if not for most purposes (except as between themselves and their principal), they are treated as the owners of the goods.[2] We have seen, that consignees for sale, such as commission

unless the goods upon which they have made advances, if sold when orders were given, would fail to bring the amount advanced by them, or would otherwise prejudice them, Blair *v.* Childs, 10 Heisk. 199; Howland *v.* Davis, 40 Mich. 545: and where A. purchased and shipped cotton to B., a factor, with an order to sell immediately, which B. failed to do, but wrote A., advising him to wait for a better market, and asking immediate instructions, which A. did not give, and took no notice of B.'s letters, and finally wrote, repeating his first order to sell at once, it was held that B. was responsible only for delay after A.'s final letter, McLendon *v.* Wilson, 52 Ga. 41; Mann *v.* Laws, 117 Mass. 293. — Ed.]

[1] [Ante, §§ 13, 14. This rule, as laid down in the text, is somewhat changed by the usages of trade. Thus, where a factor ships his principal's goods to another market, to be sold by a sub-agent, the principal can collect from the sub-agent the amount received by him for the goods, Jackson Ins. Co. *v.* Partee, 9 Heisk. 296: but where, in such a case, the sub-agent sells the goods for a sum less than the factor's advances and charges, and the factor seeks to recover the deficit from his principal, he must show that he faithfully imparted to such sub-agent the instructions given to him, and that the sub-agent strictly followed them, Strong *v.* Stewart, 9 Heisk. 137. And if the factor conducts his business according to the known usages of trade, he will be exonerated from all responsibility. Phillips *v.* Moir, 69 Ill. 155. The effect of the established customs and usages of the stock exchange upon the duties and liabilities of brokers has been discussed with great power in the recent cases of Coles *v.* Bristowe, 17 W. R. 105; and Grissell *v.* Bristowe, L. R. 4 C. P. 36. These cases decide that one who employs a broker to transact business for him upon the stock exchange must expect that he will do it with reference to the established customs and usages there, and is bound by his acts, notwithstanding he gave him express instructions to proceed in a different mode. See also Maxted *v.* Paine, L. R. 4 Ex. 81; s. c. L. R. 4 Ex. 203; s. c. L. R. 6 Ex. 132; Davis *v.* Haycock, L. R. 4 Ex. 373; Duncan *v.* Hill, L. R. 6 Ex. 255. — Ed.]

[2] Ante, §§ 34, 102, note. The question as to the precise time when the property may be said to vest in a factor, who is consignee under liabilities in advance, properly falls under the law of shipping, and especially under that branch of it which respects the right of stoppage *in transitu*. See Abbott on Shipp. Pt. 4, ch. 10, §§ 1, 2, 4; Holbrook *v.* Wight, 24 Wend. 169; Hall *v.* Smith, 1 Bos. & Pull. 563; Post, § 350. [Factors do not acquire such an ownership in goods consigned to them for sale, although they have made advances upon them, merely by their holding the bill of lading, as to defeat the rights of parties who get an attachment on the goods, before the bill of lading is received. Delop *v.* Windsor, 26 La. Ann. 185; Loomis *v.* Barker, 69 Ill. 360; Saunders

merchants, are truly described as factors.[1] The question has often been discussed, whether factors, or consignees for sale, have an implied authority to insure for their principal; for there cannot be a doubt, that they may insure upon their own account to the extent of their own interest. The general doctrine now established is, that they may insure both for themselves and for their principal.[2] But they are not positively bound to insure, unless they have received orders to insure, or promise to insure, or the usage of trade, or the habit of dealing between them and their principals, raises an implied obligation to insure.[3] They may insure in their own names, or in the name and for the benefit of their principal. If they insure in their own name only, they may, in case of loss, recover the whole amount of the value of the property insured from the underwriters, and the surplus beyond their own interest, will be a resulting trust

v. Bartlett, 12 Heisk. 316. But a factor can maintain trover for goods which have been consigned to him, but which he has not received. Fowler *v.* Down, 1 B. & P. 44. So, under the Abandoned and Captured Property Act, a factor who has merely made advances on such property is held not to be "the owner" beyond the extent of his lien. U. S. *v.* Villalonga, 23 Wall. 35. But a commission merchant is not liable in trover, who sells and delivers property intrusted to him for sale, before notice of the revocation of his authority. Jones *v.* Hodgkins, 61 Me. 480. See First Nat. Bank *v.* Shaw, 61 N. Y. 283, and Howland *v.* Woodruff, 60 N. Y. 73, for construction of the Factors' Act, N. Y. Stat. 1830, c. 179. — Ed.]

[1] Ante, §§ 33, 34; 3 Chitty on Com. & Manuf. 204, 205; Martini *v.* Coles, 1 M. & Selw. 140, 147.

[2] [Factors may insure the goods of their principals, but they are not bound to do so, unless they have received orders so to do, or, from the usage of trade or the habit of dealing between them, an obligation to insure is implied; and in such case, if they fail to insure the goods, they become the insurers themselves, and as such are liable in the event of loss. Schoenfeld *v.* Fleisher, 73 Ill. 404; Waters *v.* Monarch Life & Fire Ins. Co., 5 El. & Bl. 870. But a factor's right to insure the property of his principal does not authorize him to take out a policy in a mutual company, which would make the principal an insurer of others. White *v.* Madison, 26 N. Y. 117; Lee *v.* Adsit, 37 N. Y. 87. And where a firm of commission merchants invite consignments of goods by letter, in which they state that the goods will be covered by insurance as soon as received, they do not become thereby the insurers of the goods, and their duty is fulfilled, by obtaining reasonable and proper insurance in companies which afterwards fail to pay the loss in full in consequence of a great and general conflagration, and such policies need not be taken in the name of the consignor nor placed in his possession or control. Johnson *v.* Campbell, 120 Mass. 449. — Ed.]

[3] Post, § 190; Smith *v.* Lascelles, 2 T. R. 189; Crauford *v.* Hunter, 8 T. R. 13; French *v.* Backhouse, 5 Burr. 2727; Morris *v.* Summerl, 1 Cundy's Marshall on Ins. 301 a, note; Randolph *v.* Ware, 3 Cranch, 503; Columbian Ins. Co. *v.* Lawrence, 2 Peters, 25.

for the benefit of their principals.[1] Whether, if they are mere naked consignees, to take possession of the goods only, without a power to sell, they have a right to insure for themselves, or for their principal, is perhaps more questionable; but the point has not as yet become the subject of direct adjudication.[2]

§ 112. It is to this consideration, that factors are to be treated as special owners of the property consigned to them, that we may refer many of the rights and powers attributed to them. They may sue in their own names for the prices of goods sold by them for their principal;[3] and they are also liable to be sued for goods bought by them for their principal; and of course they have a right in their own names to receive payments, to give receipts for payments, and to discharge the debtors from their official transactions,[4] at least, unless notice is given to the contrary by their principal.[5] The circumstance, that factors are acting under a *del credere* commission, does not seem to make any difference as to the validity or extent of their authority.[6]

§ 113. On the other hand, factors have no incidental authority to barter the goods of their principal,[7] or to pledge such goods for advances made to them on their own account, or for debts due by themselves;[8] although they may certainly pledge them for ad-

[1] Ibid.; Post, §§ 16, 272, 277, 394.

[2] Wolfe *v.* Horncastle, 1 Bos. & Pull. 323; Lucena *v.* Crawford, 3 Bos. & Pull. 75; Lucena *v.* Crawford, 2 Bos. & Pull. N. S. 324, per Lord Eldon; Cornwall *v.* Wilson, 1 Ves. 509; De Forest *v.* Fulton Ins. Co. 1 Hall, 84, 106, 107, 134, 135. This whole subject underwent much examination in the case of Lucena *v.* Crawford, 3 Bos. & Pull. 75; S. C. 5 Bos. & Pull. 269. But the most ample and satisfactory discussion of it is to be found in the very elaborate opinions delivered by Mr. Chief Justice Jones, and Mr. Justice Oakley, in the Superior Court of New York, in De Forest *v.* The Fulton Ins. Co. 1 Hall, 84, 100–136.

[3] [See White *v.* Chouteau, 10 Barb. 202.]

[4] Drinkwater *v.* Goodwin, 1 Cowp. 251; Johnson *v.* Usborne, 11 Adolph. & Ellis, 549; Post, § 400; [Thompson *v.* Fargo, 63 N. Y. 479].

[5] Post, §§ 401, 401 *a*.

[6] Morris *v.* Cleasby, 4 M. & Selw. 566, 574, 575; Ante, § 33, and note; Thompson *v.* Perkins, 3 Mason, 232; 2 Kent, Comm. Lect. 41, p. 624 (4th ed.); 2 Stair, Instit. by Brodie, 921, 922, note; Post, § 215; [Graham *v.* Ackroyd, 19 Eng. Law & Eq. 659; 10 Hare, 192].

[7] Ante, § 78; Guerriero *v.* Peile, 3 B. & Ald. 616; 2 Kent, Comm. Lect. 41, pp. 625–628 (4th ed.); [Wheeler, &c. Manuf. Co. *v.* Givan, 65 Mo. 89].

[8] Post, § 389; 3 Chitty on Com. & Manuf. 204, 205; Rodriguez *v.* Heffernan, 5 John. Ch. 429; 2 Kent, Comm. Lect. 41, pp. 625–627 (4th ed.); 1 Bell, Comm. B. 3, Pt. 1, ch. 4, art. 412, pp. 388–394 (4th ed.); Id. pp. 485–488 (5th ed.); Boyson *v.* Coles, 6 M. & Selw. 14; Evans *v.* Potter, 2 Gall. 13, 14;

vances lawfully made on account of their principal, or for advances made to themselves, to the extent of their own lien on the goods.[1]

Van Amringe *v.* Peabody, 1 Mason, 440. The point, whether a factor has an authority to pledge the goods of his principal, as has been already stated (Ante, § 78, note), has undergone a good deal of discussion, and no small degree of doubt has been entertained upon it, until a recent period. The doctrine is now fully established in England, that he cannot pledge, although some of the judges have lamented the establishment of it. The same doctrine seems now generally established in America. Rodriguez *v.* Heffernan, 5 John. Ch. 429; 2 Kent, Comm. Lect. 41, pp. 625, 626 (4th ed.); Story on Bailm. §§ 325, 326. In Scotland, as Mr. Bell informs us (1 Bell, Comm. art. 412, p. 388, 4th ed.; Id. pp. 485–488, 5th ed.), the doctrine is directly the other way. The English doctrine is apparently founded upon the rule of the civil law, — Nemo plus juris in alium transferre potest, quam ipse haberet. (Dig. Lib. 50, tit. 17, l. 54.) In the civil law, this rule was directly applied to the case of pledges. Jure pignoris teneri non posse, nisi quæ obligantis in bonis fuerint; et per alium rem alienam invito domino pignori obligari non posse, certissimum est. (Cod. Lib. 8, tit. 16, l. 6.) The same rule has been generally applied in the law of the continental nations of Europe, as for example, in France, Holland, and Italy, and also in Scotland. Still, it is but a general rule; and therefore not absolutely superseding other considerations, growing out of the character of the parties, and the nature of the particular authority conferred upon the party who is in possession of the property. The question is not, in many cases, whether a party can transfer that to another, which he does not in reality possess and own; but whether a party, ostensibly clothed with the ownership of property by the real owner, and thus acquiring an apparent authority to dispose of the whole interest, may not dispose of an interest in such property, less than the whole, to another innocent party. If one of two innocent persons must suffer by the wrongful act of a third person, it is certainly most conformable to equity and sound principles, that he should suffer, who has enabled such third person to hold himself out as competent to do the act. The very circumstance, that in England, the Parliament has interfered, and, by an express statute (6 Geo. IV. ch. 94), amendatory of a prior act on the same subject (4 Geo. IV. ch. 83), enabled factors and others, not owners, to pledge goods for advances made to them, as well as for pre-existing debts, demonstrates the inconveniences of the old rule; and the importance of relaxing it in commercial transactions. This statute, and the constructions put upon it, are given at large in Paley on Agency, by Lloyd, pp. 219–233, and

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[1] 1 Bell, Comm. B. 3, Pt. 1, ch. 4, art. 412, pp. 391, 392 (4th ed.); Id. pp. 385–389 (5th ed.); Pultney *v.* Keymer, 3 Esp. 182; Urquhart *v.* McIver, 4 John. 103; McCombie *v.* Davis, 7 East, 5; 2 Kent, Comm. Lect. 41, pp. 625–628 (3d ed.). See Mann *v.* Shiffner, 2 East, 523, 529; Solly *v.* Rathbone, 2 M. & Selw. 298; Story on Bailm. §§ 325–327. Some of the American states, and particularly Rhode Island, New York, and Pennsylvania, have in substance, by positive enactments, adopted the statute of 6 Geo. IV. ch. 94, on the subject of factors. 2 Kent, Comm. Lect. 41, p. 628, note (*a*), (4th ed.). [As to New York Act, see Florence Machine Co. *v.* Warford, 1 Sweeney (N. Y.), 433; Hardee *v.* Hall, 12 Bush, 327.]

So, factors may pledge the goods of their principal for the payment of the duties and other charges due thereon; and, indeed, for any other charges and purposes, which are allowed or justified by the usages of trade.[1]

Appendix No. 1, pp. 403–407. An additional statute on the same subject has since been passed. (5th & 6th Victoria, ch. 39.) See Smith on Merc. Law, pp. 112–122; Id. Appendix, lii.; Id. ccxvi. (3d ed. 1843). Mr. Bell, in his Commentaries (1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 4, art. 412, pp. 388–394 (4th ed.); Id. pp. 485–488 (5th ed.)), has given his own views in favor of the doctrine that the factor has a right to pledge, with great clearness; and has also expounded, in his text and notes, the present state of the law on this point among the continental nations of Europe. Dan. & Lloyd's Mercantile Cases, 29, note to Blandy *v.* Allen; Story on Bailm. §§ 324, 326, 327; Evans *v.* Potter, 2 Gall. 14; 3 Kent, Comm. Lect. 41, pp. 625–628 (4th ed.); Williams *v.* Barton, 3 Bing. 139; Queiroz *v.* Trueman, 3 B. & Cressw. 342; Laussatt *v.* Lippincott, 6 Serg. & R. 386; [Benny *v.* Rhodes, 18 Mo. 147; Kelly *v.* Smith, 1 Blatchf. 290; First National Bank of Macon *v.* Nelson, 38 Ga. 391. For the construction put upon the English Factors' acts, see Fuentes *v.* Montis, L. R. 3 C. P. 268.]

[1] Evans *v.* Potter, 2 Gall. 13. See 2 Kent, Comm. Lect. 41, pp. 627, 628 (4th ed.); Pultney *v.* Keymer, 3 Esp. 182; Laussatt *v.* Lippincott, 6 Serg, & R. 386. This I conceive to be the true doctrine, notwithstanding the language used in some of the authorities. The case of Pultney *v.* Keymer, 3 Esp. 182, may be deemed overruled by the latter cases, and especially by the cases of Shipley *v.* Kymer, 1 M. & Selw. 484; Solly *v.* Rathbone, 2 M. & Selw. 298; Cockran *v.* Irlam, 2 M. & Selw. 301; Martini *v.* Coles, 1 M. & Selw. 140, and Boyson *v.* Coles, 6 M. & Selw. 14, as to the point of advances made to an agent on his own account. See also Daubigny *v.* Duval, 5 T. R. 604; Queiroz *v.* Trueman, 3 B. & Cressw. 342; Mark *v.* Bowers, 16 Martin, 95. In Martini *v.* Coles, 1 M. & Selw. 140, Lord Ellenborough and Mr. Justice Le Blanc recognized the right to pledge for advances and charges on account of the principal. The cases of Solly *v.* Rathbone, 2 M. & Selw. 298, and Cockran *v.* Irlam, 2 M. & Selw. 301, note, do, it must be admitted, seem to overturn the authority of Pultney *v.* Keymer, 3 Esp. 182, as to the point of advances and charges made on account of the principal. But in each of those cases, there was this ingredient, that it was not the case of a mere pledge for advances and charges on account of the principal, but a delegation also of authority to the pledgee, as sub-agent or co-agent, to sell the goods, which was held to be tortious; as an agent could not delegate his authority. *Pro tanto*, no doubt, the authority was void. But why should the pledge be held void, as to advances and charges made for the principal? The ground seems to have been (whether it be satisfactory or not), that the sale by the pledgee as co-agent or sub-agent, made the whole proceeding tortious *ab initio*. That doctrine would not apply to a mere pledge for advances and charges required to be made for the principal, where the original agent still retained his general authority. This whole subject is very accurately and clearly discussed, and the results stated, in Mr. Chancellor Kent's learned Commentaries. 2 Kent, Comm. Lect. 41, pp. 625–628 (4th ed.). What circumstances will or will not amount to an implied authority to an agent, from whom advances are asked, to make a pledge for such advances, is a matter upon which the authorities leave much doubt; and especially the cases

§ 114. Fourthly, as to cashiers of banks. It may be stated, as a general proposition, that the officers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business of such institutions, and that their acts, within the scope of such usage, practice, and course of business, bind the bank in favor of third persons, having no knowledge to the contrary.[1] The cashier of a bank is usually intrusted with all the funds of the bank, in cash, notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He is accustomed to receive directly, or through the subordinate officers, all moneys and notes of the bank; to deliver up all discounted notes, and other securities and property, when payment of the dues for which they are given, have been made; and to draw checks from time to time for money, wherever the bank has deposits and pecuniary funds. In short, he is considered as the executive officer, through whom and by whom the whole moneyed transactions of the bank, in paying or receiving debts, and discharging or transferring securities, are to be conducted. It does not seem, therefore, too much to infer, in the absence of all positive and known restrictions, that he possesses the incidental authority, and, indeed, that it is his duty to apply the negotiable funds, as well as the moneyed

of Graham *v.* Dyster, 2 Stark. 21, and Queiroz *v.* Trueman, 3 B. & Cressw. 342; and Laussatt *v.* Lippincott, 6 Serg. & R. 386; Newbold *v.* Wright, 4 Rawle, 195. [It seems that a factor may pledge goods on which he has made advances to the extent of his interest in them; and if he does so without authority, he does not thereby lose his power to sell them, Blair *v.* Childs, 10 Heisk. (Tenn.) 199; Nowell *v.* Pratt, 5 Cush. 111; but it has been held that such pledge will not be good to the extent of the factor's charges, if he has not first demanded payment of them; and trover will lie against him and the pledgee, if the latter has sold the goods, even though he was ignorant of the character in which his pledgor held them. Merchants' Nat. Bank *v.* Trenholme, 12 Heisk. 520; but it has been held in a late case, that a factor with a power to sell the goods consigned to him, has no right to pledge them; and the owner may reclaim the goods from the pledgee, although the pledgee had no notice that the goods did not belong to the factor. Gray *v.* Agnew, 14 Am. Law Rev. 457. But property pledged may, with the assent of the pledgor, express or implied, be used in any way consistent with the general ownership and ultimate rights of the former to have the property when the lien is discharged. Lawrence *v.* Maxwell, 53 N. Y. 19. But see City Bank *v.* Barrow, L. R. 5 App. Cas. 664; Wadsworth *v.* Gay, 118 Mass. 44; Daniell *v.* Swift, 54 Ga. 113. — Ed.]

[1] Minor *v.* Mechanics' Bank of Alexandria, 1 Peters, 46, 70; Fleckner *v.* Bank of the United States, 3 Wheat. 360, 361; [Frankfort Bank *v.* Johnson, 24 Me. 490; Merchants' Bank *v.* State Bank, 10 Wall. 604; Cooke *v.* State National Bank, 52 N. Y. 96].

capital of the bank, to discharge its debts and obligations.[1] Hence, it seems to be a natural conclusion, that *prima facie*, the cashier of a bank possesses the incidental authority to indorse the negotiable securities held by the bank, in order to supply the wants and to promote the interests of the bank; and any restriction upon such authority must be established by competent proofs, and will not be presumed to exist.[2] So, also, he possesses authority to draw checks upon other banks, upon the deposits therein

[1] Fleckner *v.* Bank of the United States, 8 Wheat. 360, 361; [Cochecho National Bank *v.* Haskell, 51 N. H. 116; Merchants' Bank *v.* State Bank, 10 Wall. 604].

[2] Wild *v.* Bank of Passamaquoddy, 3 Mason, 505. See also Folger *v.* Chase, 18 Pick. 63; Spear *v.* Ladd, 11 Mass. 94; Northampton Bank *v.* Paxson, 11 Mass. 288. [Where a bank was sued for the refusal of its cashier to transfer stock held by the bank as collateral, it was held that, as the cashier had been intrusted by the directors with the duty of transferring such stock, his refusal to do so was the act of the bank. Case *v.* Bank, 100 U. S. 446; Corser *v.* Paul, 41 N. H. 24; Fay *v.* Noble, 12 Cush. 1; Elliot *v.* Abbott, 12 N. H. 549; Matthews *v.* Mass. Nat. Bank, 1 Holmes, 396. In this last-named case, which was decided by the late Justice Shepley, the facts were as follows: —

A stock certificate originally for two shares of stock in the name of C., which had been by him fraudulently altered so as to purport to be for two hundred shares in the name of a certain bank as collateral, was received in good faith by the bank from C. as collateral security for a loan to him. On payment of the loan by C., the cashier of the bank, as such, signed a transfer in blank upon the back of the certificate, and delivered it to C. Afterwards, the plaintiff in good faith received the same certificate from C. as collateral security for a loan then made to him. The plaintiff's loan was not paid.

In delivering his opinion, Shepley, J., said: "The defendant denies that the cashier had authority or right to bind the bank by the contract declared on. Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business conducted by the bank. Their acts, within the scope of such usage, practice, and course of business, will in general bind the bank in favor of third persons possessing no other knowledge. Morse *v.* Mass. Nat. Bank, 1 Holmes, 209; Minor *v.* Mechanics' Bank, 1 Pet. 70; Merchants' Bank *v.* State Bank, 10 Wall. 604. One of the ordinary and well-known duties of the cashier of a bank is the surrender of notes and securities upon payment; and his signature to the necessary transfers of securities or collaterals, when in the form of bills of exchange, choses in action, stock certificates, or similar securities for loans, which are personal property, is an act within the scope of the general usage, practice, and course of business in which cashiers of a bank are held out to the public as having authority to act. Undoubtedly the ordinary duties of a cashier do not comprehend the making of a contract which involves the payment of money, without an express authority from the directors, unless it be such as relates to the usual and customary transactions of the bank. But the transfer of certificates of stock held as collateral is certainly one of the usual and customary transactions of banks, and the public would be no more likely to require evidence of a special authority to the

of the funds of his own bank. And whether a particular check is drawn by him in his official, or in his private capacity, does not depend necessarily upon the form or face of the check, but, in case of doubt, the matter is open to explanation by parol evidence.[1]

§ 115. But the cashier of a bank possesses no incidental authority to make any declarations, binding upon the bank, in matters not within the scope of his ordinary duties. Thus, for example, he has no authority to bind the bank upon a note being offered for discount, by his declaration to a person who is about to become an indorser, that he will incur no risk and no responsibility by becoming an indorser upon such discount.[2] So, if a cashier of a bank should promise to pay a debt which the corporation did not owe, and was not liable to pay, or if he should admit forged bills of the bank to be genuine, the bank would not be bound by such promise or admission, unless it had authorized or adopted the act.[3] But, if the cashier of a bank should pay to a *bona fide* holder a forged check drawn upon the bank, the payment could not be recalled, but would be obligatory; for it is within the duty of the cashier to answer drafts drawn on the bank; and the bank intrusts him with an implied authority to decide upon the genuineness of the handwriting of the drawer of the check, when presented for payment.[4] The same rule will apply to the payment of forged bank-bills of a bank, by the cashier, upon presentment by a *bona fide* holder. The

cashier to make such transfer, than of a special authority to draw checks on other banks, or to perform any other of the daily duties of his office.

"The signature of the cashier must therefore be considered as the signature of the bank, and the question returns, whether such blank assignment on the back of the certificate by the bank be so far a warranty of the genuineness of the certificate that the bank is estopped from setting up the forgery as a defence. In the case of forged negotiable instruments it is well settled that the indorser warrants that the instrument itself and the antecedent signatures thereon are genuine." See Post, 308, n. — ED.]

[1] Mechanics' Bank of Alexandria *v.* Bank of Columbia, 5 Wheat. 326, 337; [Bank of Newbury *v.* Baldwin, 1 Clifford, 519].

[2] Bank of the United States *v.* Dunn, 6 Peters, 51; Bank of the Metropolis *v.* Jones, 8 Peters, 12; [Cochecho National Bank *v.* Haskell, 51 N. H. 116].

[3] Salem Bank *v.* Gloucester Bank, 17 Mass. 1; [Merchants' Bank *v.* Marine Bank, 3 Gill, 97].

[4] Levy *v.* Bank of the United States, 1 Binn. 27; Bank of the United States *v.* Bank of Georgia, 10 Wheat. 333. [The statement of a bank-teller that the indorsement on a check is genuine does not bind the bank, as he is only held out as an agent with limited powers. Walker *v.* St. Louis Nat. Bank, 5 Mo. App. 214. — ED.]

payment cannot be recalled; for the cashier is bound to know the genuine paper of the bank.[1] It may, however, be generally stated that the cashier of a bank cannot, by his acts, bind the bank, unless in cases within the scope of his authority.[2]

§ 116. Fifthly, as to masters of ships. The master of a ship has various incidental powers, resulting from his official capacity, which have been long recognized in the maritime law, and are not now open to judicial controversy. Thus, for example, he has an incidental authority to make all contracts belonging to the ordinary employment of the ship; as, for example, to let the ship on a charter-party, and to take shipments on freight, if such is the usual employment of the ship, but not otherwise;[3] to hire seamen for the voyage; to contract for necessary repairs and equipments for the voyage;[4] and to hypothecate the ship in foreign ports for moneys advanced to supply the necessities of the ship, if they cannot otherwise be supplied.[5] In these cases, and in others of the like nature,

[1] Bank of the United States *v.* Bank of Georgia, 10 Wheat. 333; Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 28.

[2] Foster *v.* Essex Bank, 17 Mass. 479. See also 1 Bell, Comm. p. 480 (5th ed.). [Where a cashier certified a check to be "good when properly endorsed," which on its face showed that it was to be held as collateral, it was held that he had no authority to bind the bank by such certificate, as the check was not drawn in the usual course of business, Dorsey *v.* Abrams, 85 Pa. St. 299: nor can a cashier bind the bank as accommodation indorser on his individual note, West, &c. Bank *v.* Shawnee Bank, 95 U. S. 557: nor do his declarations as to past transactions, as to the payment of a note, for instance, bind the bank, Franklin Bank *v.* Stewart, 37 Me. 519; Frankfort Bank *v.* Johnson, 24 Me. 490: but a bank was held responsible where the manager absconded with the plaintiff's money on the ground that he had authority from the bank to assign securities, and was apparently acting within scope of his authority, Thompson *v.* Bell, 10 Ex. 10. — Ed.]

[3] Pickering *v.* Holt, 6 Greenl. 160.

[4] [Where the master of a ship accepts the services of a pilot in taking a letter, and there is a usage of the port by which pilots can charge the owners for such services, *held*, that the owners must pay a proper charge for such service. Fowler *v.* Pickering, 119 Mass. 33. But the master cannot bind the owners by a promissory note given to the pilot for his services. Gregg *v.* Robbins, 28 Mo. 347; Provost *v.* Patchin, 5 Seld. 239; Holcroft *v.* Halbert, 16 Ind. 257. And where a master was obliged to have repairs made, and a shipwright refused to allow the vessel to leave the dock until his bill was paid, and borrowed money from plaintiff, it was held that the plaintiff could recover the amount of his loan in a suit for necessaries. The Albert Crosby, L. R. 3 Ad. 37. — Ed.]

[5] Ante, § 36; Abbott on Shipp. Pt. 2, ch. 2, §§ 2–10; Id. ch. 3, §§ 1–34, pp. 91–132 (Amer. ed. 1829); Gratitudine, 3 Rob. 255–278; 3 Kent, Comm. Lect. 46, pp. 158–164 (4th ed.); Boson *v.* Sandford, 3 Mod. 321; s. c. 3 Lev. 258; 1 Show. 29, 101; Hussey *v.* Allen, 6 Mass. 163; James *v.* Bixby, 11 Mass.

he often enters (as he may well do) into the contracts in his own name; and he may thus become personally liable, as well as his

34; Pickering *v.* Holt, 6 Greenl. 160; Runquist *v.* Ditchell, cited in Abbott on Shipp. Pt. 2, ch. 2, § 8, s. c. 3 Esp. 64; 1 Bell, Comm. § 434, p. 413 (4th ed.); Id. pp. 505, 506 (5th ed.); 1 Domat, B. 1, tit. 16, § 3, art. 3. [The master has authority to hypothecate the ship provided he cannot obtain personal credit, Hearthorne *v.* Darling, 1 Mood. P. C. 5: and where it is the only method of raising money, The Trident, 1 W. Robinson, 29: but he cannot give a bottomry bond for necessaries already supplied, unless the bond had been stipulated for before they were supplied, The Hersey, 3 Hagg. Ad. 404: nor can he hypothecate the ship to free himself from arrest, Smith *v.* Gould, 4 Mood. P. C. 21: nor to pay general-average charges, The North Star, 1 Lush. 45: and his power depends not upon the mere locality of the transaction, but upon the difficulty of communication between himself and the owners, Kleinwort *v.* Cassa Maritima of Genoa, L. R. 2 App. Cas. 156: and he has this right even if in the same county with the owners, if he has no means of communicating with them, but, where it is possible for him to communicate with them, he must do so, Australian St. Nav. Co. *v.* Morse, L. R. 4 P. C. 222; La Ysabel, 1 Dods. Ad. 273: and if the supplies can be obtained on the personal credit of the owner, he has no right to pledge the ship in addition, Stainbank *v.* Fenning, 11 C. B. 51. In this case Jervis, C. J., said: "It was conceded during the argument that this was not an instrument of hypothecation in the usual form, and it was not contended the master had authority to mortgage the ship; but it was said that an hypothecation may be good without making the repayment of the advances depend upon the arrival of the ship; and that, if the lender does choose to take upon himself the risk of the ship's return, and will be content not to demand maritime interest, the master may pledge both the ship and the personal credit of the owner.

"The cases of the Tartar and the Nelson, upon which the plaintiffs' counsel relied, do not support the latter part of this proposition, for which they were cited. Where the master professes to hypothecate the ship, and also to pledge the credit of his owners, the Court of Admiralty will reject that part of the instrument which is directed to the latter object, and proceed *in rem* against the ship; but the cases cited do not show that the Court of Admiralty will do this where the instrument is not in other respects in strictness an hypothecation, because in each of those cases the return of the money depended upon the completion of the voyage, and the lender took upon himself the risk of the ship's return.

"But without reference to authority, we are of opinion, upon principle, that the master has not by an instrument of this nature authority to pledge the ship. By the Roman law, and still in those nations which have adopted the civil law, every person who had repaired or fitted out a vessel, or had lent money for those purposes, had a claim upon the value of the ship, without a formal instrument of hypothecation; but by the law of England no such right can be acquired except by express agreement, and a master can only make such an agreement if he act within the scope of his authority. The right to raise money upon bottomry can only be justified by necessity. If the master in a foreign country wants money to repair or victual his vessel, or for other necessaries, he must, in the first instance, endeavor to raise it upon the credit of the owners. If he can do so, he has no authority to hypothecate the vessel; but if he

principal, to fulfil the same ;[1] for he is treated, not as ordinary agent, but, as in some sort, and to some extent, clothed with the character of a special employer or owner of the ship, and representing, not merely the absolute owner (*dominus navis*),[2] but also the temporary owner, or charterer for the voyage (*exercitor navis*).[3] In short, our law treats him as having a special property in the ship, and entitled to the possession of it, and not as having the mere charge of it, as a servant. On this account he may bring an action of trespass for a violation of that possession ; and where the freight has been earned under a contract to which he is a party, or under a bill of lading signed by himself, he may bring a suit for the freight due on the delivery of the goods.[4]

§ 117. The civil law seems to have recognized similar rights and incidental authorities. The very definition of the master of the ship in that law indicated the nature and limits of his rights and authority. "Magistrum navis accipere debemus, cui totius navis cura mandata est;" [5] and this applied equally, whether he was

cannot otherwise obtain the money, then he may hypothecate the ship, not transferring the property in the ship, but giving the creditor a privilege or claim upon it, to be carried into effect by legal process upon the termination of the voyage." — Ed.]

[1] Post, §§ 161, 266-268, 294-299, 399. [But he must have the entire control of the vessel, let on shares to him, if the owners are not to be held liable for disbursements on its account. Wickersham *v.* Southard, 67 Me. 595. The owners of a vessel are not liable for the loss of floating stages which were towed by the vessel under an agreement made by the master that he would take care of them, Welsh *v.* Barque Carl Haasted, 14 Am. L. R. 168: nor are the owners liable to inferior employés on board a vessel for injuries inflicted by a mate outside of his orders, Dyer *v.* Rieley, 28 La. Ann. 6. In Pennsylvania the owners of a ship are responsible for necessary supplies furnished on the order of the master, unless it appear that they were furnished exclusively on the master's credit. Winsor *v.* Maddock, 64 Pa. St. 231.— Ed.]

[2] Ante, § 36; Post, §§ 294-297. See Abbott on Shipp. Pt. 2, ch. 2, § 3, note (*g*), (Amer. ed. 1829); Dig. Lib. 14, tit. 1, l. 1, §§ 1, 2, 15.

[3] Abbott on Shipp. Pt. 1, ch. 1, §§ 12, 13, and Story's note (*i*) to ed. 1829; Id. Pt. 2, ch. 2, § 2; Valejo *v.* Wheeler, 1 Cowp. 143; Soares *v.* Thornton, 7 Taunt. 627; Marcardier *v.* Chesapeake Ins. Co. 8 Cranch, 39; Taggard *v.* Loring, 16 Mass. 336; Descadillas *v.* Harris, 8 Greenl. 298; The Ship Fortitude, 3 Sumner, 228, 237-239; 1 Bell, Comm. p. 414, § 434 (4th ed.); Id. pp. 505, 522, &c. (5th ed.). The exercitor navis is (as we have already seen) the actual employer in the particular voyage, whether he be the absolute owner, or only the hirer of the ship for the voyage. Ante, § 36, note; Post, §§ 294, 295, 315; Abbott on Shipp. Pt. 2, ch. 2, § 3 (Amer. ed. 1829).

[4] Shields *v.* Davis, 6 Taunt. 65, 67; 3 Chitty on Com. & Manuf. 210. See also Williams *v.* Millington, 1 H. Bl. 81, 84.

[5] Dig. Lib. 14, tit. 1, l. 1, § 1; Pothier, Pand. Lib. 14, tit. 1, n. 1.

appointed by, and acted under, the general owner, or by and under the owner for the voyage. "Magistrum autem accipimus, non solum, quem exercitor præposuit, sed et eum, quem magister.[1] Omnia enim facta magistri debet præstare, qui eum præposuit; alioquin contrahentes decipientur; et facilius hoc in magistro quam institore admittendum propter utilitatem.[2] Non autem ex omni causâ prætor dat in exercitorem actionem; sed ejus rei nomine, cujus ibi præpositus fuerit; id est, si in eam rem præpositus sit; utputa, si ad onus vehendum locatum sit; aut aliquas res emerit utiles naviganti; vel si quid reficiendæ navis causâ contractum vel impensum est; vel si quid nautæ, operarum nomine, petent."[3] And the authority of the master was also enlarged, according to the ordinary employment of the ship. "Magistri autem imponuntur locandis navibus, vel ad merces, vel vectoribus conducendis, armamentisve emendis; sed etiam si mercibus emendis vel vendendis fuerit præpositus, etiam hoc nomine obligat exercitorem."[4] In these latter cases, however, the master acts rather as supercargo, or as factor, than in his original character as master.[5]

§ 118. The authority of the master of the ship over the cargo is, under ordinary circumstances, limited to the mere duty of the transportation and preservation of it. But he may, under circumstances of great emergency, acquire a superinduced authority to dispose of it, from the very nature and necessity of the case; and his acts will then become completely binding and obligatory upon the owners of the cargo, whether they are mere shippers, or are also owners of the ship. It is true that, in the ordinary course of things, he is treated as a mere stranger to the cargo, beyond the purposes of safe custody and conveyance, as above stated; yet, in such cases of instant, and unforeseen and unprovided-for necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the gen-

[1] Dig. Lib. 14, tit. 1, l. 1, § 5; Pothier, Pand. Lib. 14, tit. 1, n. 1; Ante, § 36; Pothier on Oblig. n. 448.

[2] Dig. Lib. 14, tit. 1, l. 1, § 5; Pothier, Pand. Lib. 14, tit. 1, n. 3; Post, § 128.

[3] Dig. Lib. 14, tit. 1, l. 1, § 7; Pothier, Pand. Lib. 14, tit. 1, n. 7; 1 Domat, B. 1, tit. 16, § 3, art. 3; Abbott on Shipp. Pt. 2, ch. 2, § 3, p. 91, note (*g*), (Amer. ed. 1829).

[4] Dig. Lib. 14, tit. 1, l. 1, § 3; Pothier, Pand. Lib. 14, tit. 1, n. 7.

[5] 1 Emerig. Assur. ch. 7, § 5, p. 193; Ante, § 36; Williams *v.* Perry, 13 Wend. 58; Freeman *v.* East India Co. 5 B. & Ald. 617.

eral policy of the law.[1] Thus, for example, in the case of a jettison, becoming necessary in the course of a voyage, the master has a right to order any goods to be thrown overboard. He may select what articles he may please; he may determine the quantity, and he is limited to no proportion. Nay, in cases of extreme necessity, where the lives of the crew cannot otherwise be saved, he may throw the whole cargo overboard.[2] So, the master may, in like manner, sacrifice a part of the cargo for the ransom of the ship, or bind the ship and cargo for the ransom.[3] So, if he is driven into a port of necessity, and the cargo is perishable, the master may sell it, as he may also sell the ship, in a case of necessity.[4] So, he may sell a part of the cargo, or he may hypothecate the whole cargo and freight, as well as the ship, for repairs of the ship, to enable her to perform the voyage.[5] In cases, also, of an abandonment by the

[1] Ante, §§ 116, 117; Post, § 164; The Gratitudine, 3 Rob. 255, 257, 258; Searle *v.* Scovell, 4 John. Ch. 222; 1 Emerig. Assur. ch. 12, § 16, pp. 429–433; Douglass *v.* Moody, 9 Mass. 548. In cases of this sort, the master assumes very much the rights and responsibilities of the negotiorum gestor of the civil law, as to which see Story on Bailm. §§ 81–83, 189, 190; Pothier, Contrat de Mandat, ch. 2, art. 3, § 1, n. 51; Ersk. Inst. B. 3, tit. 3, § 37; 2 Kent, Comm. Lect. 41, pp. 616, 617, and note (*a*), (4th ed.); Dig. Lib. 3, tit. 5, l. 2, 3; [Lemont *v.* Lord, 52 Me. 365. There is a duty on the master of a ship, as representing the ship-owner, to take reasonable care of the goods intrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking active measures where reasonably practicable under all the circumstances, to check and arrest the loss and deterioration resulting from accidents, for the necessary and immediate consequences of which the ship-owner is not liable by reason of exceptions in the bill of lading. And for neglect of this duty by the master, the ship-owner is responsible to the shipper. Notara *v.* Henderson, L. R. 7 Q. B. 225. In this case, the plaintiff shipped beans upon defendant's ship; the ship, being injured by collision, was obliged to put in for repairs; the beans were in consequence of the collision wet by sea-water; they might have been put on shore and dried during the repair of the ship; they were, notwithstanding, carried without being dried, and at the arrival at the port of destination were much deteriorated. *Held*, that it was the duty of the master to have had the beans taken out and dried, and that the ship-owners were liable for his neglect to do so. — G.]

[2] The Gratitudine, 3 Rob. 255, 257, 258.

[3] Ib. 255, 258.

[4] The Gratitudine, 3 Rob. 255, 259. [The master may sell the cargo and the ship also in case of urgent necessity. The Eliza Cornish, 26 Eng. Law & Eq. 579; Robertson *v.* Clarke, 1 Bing. 445; Hunter *v.* Parker, 7 M. & W. 322. But the sale of the vessel is not within the general authority of the master. Johnson *v.* Wingate, 29 Me. 404. — Ed.]

[5] The Gratitudine, 3 Rob. 255, 260–265; Abbott on Shipp. Pt. 2, ch. 3,

owner of the ship or cargo to the underwriters, for a total loss during the voyage, the master becomes the agent of the underwriters by operation of law, with the same general rights and authorities, as he would have in regard to the owner.[1]

§ 119. The restrictions upon the incidental powers of the master are apparent from the preceding statements. Ordinarily, indeed, these incidental powers belong to the master only in the absence of the owner or employer of the ship; as, for example, when the ship is in a foreign port, and not in the home port. For, when the owner or employer is present, he is known to possess, and is presumed to exercise, his own right of general superintendence over the conduct of the ship and its concerns, unless some presumption of a delegation of authority to the master can be implied, either from the usage of trade, or the particular employment of the ship, or the conduct and proceedings of the parties.[2] Even in the home port, however, there are many acts which are so invariably confided to the master, as to amount to a positive delegation of authority. Thus, the master is ordinarily intrusted with the authority of shipping the

§§ 17–33, and notes to Amer. ed. 1829; The Packett, 3 Mason, 255; United Ins. Co. *v.* Scott, 1 John. 106; American Ins. Co. *v.* Coster, 3 Paige, 323; 4 Kent, Comm. Lect. 46, pp. 271–275 (4th ed.). [The master has no authority to sell the whole of the cargo for the purpose of repairing the ship, where the repairs cost more than the value of ship and freight. Duncan *v.* Benson, 1 Exch. 537. He has authority to make such necessary repairs as the owner of the vessel would have ordered, if present, and acting as a prudent man would; and can bind the owners therefor. The Riga, L. R. 3 Ad. 516. But the master cannot legally, for such purposes, hypothecate the cargo alone, or the ship and cargo without freight; he must first exhaust ship and freight before touching the cargo. In cases of necessity he can hypothecate ship, freight, and cargo. The Karnak, L. R. 2 A. & E. 309; s. c. L. R. 2 P. C. 505; Heathorne *v.* Darling, 1 Mood. P. C. 5. But where master has given a bottomry bond on the ship, freight, and cargo, the ship and freight being insufficient to pay claims, and the plaintiff, the owner of the cargo, had to pay the balance of the debt, it was held that he could not recover from the foreign owners of the vessel, as under foreign law the owners were not liable after giving up the ship and freight. Lloyd *v.* Guibert, L. R. 1 Q. B. 115. The master, after making extraordinary expenditure to save the cargo, can detain the whole cargo till the amount is repaid, Hingston *v.* Wendt, L. R. 1 Q. B. D. 367: and his lien on the freight for wages and disbursements has priority to mortgages, The Feronia, L. R. 2 A. & E. 65; The Mary Ann, L. R. 1 A. & E. 8. — Ed.]

[1] Gen. Int. Ins. Co. *v.* Ruggles, 12 Wheat. 408.

[2] Abbott on Shipp. Pt. 2, ch. 2, §§ 1–10, and notes, Ib. (Amer. ed. 1829); 1 Bell, Comm. pp. 412, 413, §§ 433, 434 (4th ed.); Id. pp. 506, 509 (5th ed.); 1 Liverm. on Agency, 154–196 (ed. 1818); James *v.* Bixby, 11 Mass. 34, 36, 37.

officers and crew;[1] of superintending the ordinary outfits, equipments, repairs, and other preparations of the vessel for the voyage; of lading and unlading the cargo; and, in cases of a general ship, of receiving goods on board on freight, and of signing bills of lading for the same.[2] These are such usual incidents of his official charac-

[1] Blunt's Com. Dig. 152; 1 Emerig. Assur. ch. 7, § 5, p. 193; Cleirac, Jugemens d'Oleron, 1 Valin, Com. Lib. 2, tit. 1, art. 5, p. 384; Consolato del Mare, ch. 55, 195.

[2] 1 Bell, Comm. pp. 413, 414, § 434 (4th ed.); Id. pp. 506, 507 (5th ed.); Abbott on Shipp. Pt. 2, §§ 1–11; Id. ch. 3, §§ 1–34 (Amer. ed. 1829), and notes, Ib.; 3 Kent, Comm. Lect. 46, pp. 158–176 (4th ed.); James *v.* Bixby, 11 Mass. 34, 36, 37. [But the master has no authority to sign a bill of lading for goods not actually put on board, and the consignee and all parties are held to act with notice of this limitation of the power of the master and at their own risk with regard to the fact of shipment and the quantity of cargo; they cannot hold the owners responsible for a failure in either matter. Baltimore, &c. R. R. Co. *v.* Wilkens, 44 Md. 1; Grant *v.* Norway, 2 Eng. L. & Eq. 337; s. c. 10 C. B. 665. In the last-named case, Jervis, C. J., in a careful opinion, said: "The point presented is whether the master of a ship, signing a bill of lading for goods which have never been shipped, is to be considered as the agent of the owner in that behalf, so as to make the latter responsible. The authority of the master of a ship is large, and extends to all acts that are usual and necessary for the use and management of the vessel, but it is subject to several well-known limitations. He may make contracts for the hire of the ship for carrying, or he may vary that which the owner has made; he may take up moneys in foreign ports, and, under certain circumstances, at home, for necessary disbursements for repair, and bind the owners for repayment; but his authority is limited by the necessity of the case, and he cannot make them responsible for money not actually necessary for those purposes, although he may contend that it is. He may make contracts to carry goods on freight, but cannot bind the owner to carry freight free. So, with regard to goods put on board, he may sign the bill of lading, and acknowledge the nature, quality, and condition of the goods. The master is a general agent to perform all things relating to the usual employment of his ship; and his authority, as such agent, to perform all such things as are necessary in the line of business in which he is employed, cannot be limited by any private orders not known to the party in any way dealing with him. Is it, then, usual in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board? In Lickbarrow *v.* Mason, 2 T. R. 63, Buller, J., says: 'A bill of lading is an acknowledgment by the captain of having received the goods on board his ship: therefore it would be a fraud in the captain to sign such a bill of lading if he had not received goods on board, and the consignee would be entitled to his action against the captain for the fraud.' It is not contended, in this case, that the captain had any real authority to sign the bill of lading unless the goods had been shipped; nor can we discover any ground on which a party, taking a bill of lading by indorsement, could be justified in assuming he had authority to sign such bill, whether the goods were put on board or not. If, then, from usage and the general practice of ship-masters, it is generally known that the master derives no such authority

ter, that notice of a positive prohibition would seem indispensable, in order to affect third persons with his want of due authority to do the acts.[1]

§ 119 *a*. In respect to borrowing money, and obtaining supplies for the necessary use of the ship, upon the credit of the owner, the master has an implied authority so to do, not only in a foreign port, but also in the home port, provided the owner is absent, and no communication can be had with him without great delay and prejudice, and the necessity is pressing.[2] But if the means of communication with the owner are reasonably within the reach of the master, and the necessity is not pressing, and no injurious delay or prejudice will arise from waiting until such communication is had, the authority of the master to borrow money, or to procure supplies upon the credit of the owner, will not be implied.[3]

§ 120. The master is also usually intrusted with the discharge,

from his position as master, the case must be considered as if the party taking the bill of lading had notice of the express limitation of authority, and in that case undoubtedly he could not claim to bind the owner by the bill of lading signed, when the goods therein mentioned were not on board. It resembles the case of goods or moneys taken up by the master on the pretence that they were wanted for the ship, when in fact they were not; or a bill of exchange accepted or indorsed by procuration, when no such agency existed. So, here, the general usage gives notice to all people, that the authority of the captain to give bills of lading is limited to such goods as have been put on board; and the party taking the bill of lading, either originally or by indorsement of the goods, which have never been put on board, is bound to show some particular authority to the master to sign the bill in that form. There is very little to be found in the books on this subject; it was discussed in the case of Berkley *v.* Watling, 7 Adolph. & Ellis, 29; but that case was decided on another point, although Littledale, J., said, in his opinion the bill of lading was not conclusive, under similar circumstances, on the ship-owner. For these reasons, we are of opinion that the issue should be entered for the defendants, and that the defendants are entitled to the judgment of the court." See also Hubbersty *v.* Ward, 8 Exch. 330; Coleman *v.* Riches, 16 C. B. 104; Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank, 16 N. Y. 151. — ED.]

[1] 1 Bell, Comm. p. 414, § 434 (4th ed.); Id. pp. 506, 507 (5th ed.).

[2] Johns *v.* Simons, 2 Adolph. & Ellis, New Rep. 425, 430; Arthur *v.* Barton, 6 Mees. & Wels. 138; Stonehouse *v.* Gent, 2 Adolph. & Ellis, New Rep. 431, note; Hawtayne *v.* Bourne, 7 Mees. & Wels. 595, 599, 600, by Mr. Baron Parke. See also The Alexander, cited 2 Park on Insur. by Hildyard, Append. 1057, 1061 (8th ed.), 1842; 1 W. Rob. 346.

[3] [And in like manner, if the supplies have been procured, or the repairs made, the master cannot afterwards borrow money on the owners' credit to pay for them, Belden *v.* Campbell, 6 Exch. 886: nor give bottomry bond for such necessaries already supplied, unless it had been stipulated for before they were supplied, The Hersey, 3 Hagg. Ad. 404. — R.]

as well as the hiring, of the officers and seamen of the ship in the home port; and in foreign ports he possesses this incidental authority as a necessary discretion, to be exercised by him, in cases where the law does not prohibit the discharge, for the general welfare of the voyage.[1] In a foreign port, also, he possesses the incidental authority, if he should be disabled by illness, or otherwise, to appoint a new master to serve in his stead, whose acts will, under such circumstances, become obligatory upon the owner.[2]

§ 121. The incidental powers of the master are, however, restricted to those which belong to the usual employment or business of the ship.[3] Thus, if the ordinary employment of the ship has been the carrying of cargoes on the sole account of the owner, the master has no implied authority to let the ship to freight, even in a foreign port. So, if the ordinary employment has been to take goods on board on freight, as a general ship, and common carrier, the master will not be presumed to possess authority to let the ship on a charter-party for a special and different business. So, if the ship has been accustomed to carry passengers only, the master will not be presumed to possess authority to take goods on board on freight. So, if the ship has been accustomed to the coasting trade, or the fisheries, or to river navigation only, the master will not be presumed to possess authority to divert the ship into another trade, or business, or voyage on the high seas.[4]

§ 122. So, the authority of the master as to repairs of the ship, even in a foreign port, is limited to those which are necessary re-

[1] Blunt's Com. Dig. 152; 3 Kent, Comm. Lect. 46, pp. 183, 184 (4th ed); Abbott on Shipp. Pt. 2, ch. 4, § 6, and note (2); Id. § 15, and note (1) to American ed. 1829; Robinet *v.* Ship Exeter, 2 Rob. 261.

[2] 1 Bell, Comm. § 434, p. 413 (4th ed.); Id. pp. 506, 507 (5th ed.); Rocc. de Nav. n. 5; Pothier on Marit. Contr. by Cushing, p. 26, n. 48; Id. p. 142, note.

[3] See Gen. Int. Ins. Co. *v.* Ruggles, 12 Wheat. 408; Peters *v.* Ballestier, 3 Pick. 495.

[4] Boucher *v.* Lawson, Rep. temp. Hard. 85, 194; Abbott on Shipp. Pt. 2, ch. 2, §§ 7–10, and note (3) (Amer. ed. 1829); 1 Bell, Comm. § 434, p. 413 (4th ed.); Id. pp. 506, 507 (5th ed.); Pothier on Marit. Contracts, by Cushing, n. 48, p. 26. [The master has no implied authority to agree to the substitution of another voyage in place of one agreed upon between his owners and freighters, Burgon *v.* Sharpe, 2 Camp. 529: but he may make departures from the stipulations of a charter-party, which are necessary for the safety of the voyage, Reynolds *v.* The Joseph, 2 Hughes, 58. An agent, however, at a foreign port, cannot vary the contract of charter-party by substituting another port of loading or a different description of cargo. Sickens *v.* Irving, 7 J. Scott, N. S. 165. — Ed.]

pairs.[1] But by necessary repairs we are not to understand such repairs only as are indispensable for the safety of the ship, or the due performance of the voyage, but such also as are reasonably fit and proper for the ship, or for the voyage, under all the circumstances of the case.[2]

§ 123. And this doctrine is conformable, also, to the rules laid down in the civil law. For, it is said in that law, that the nature of the appointment governs in respect to the contracts of the master. If the master is appointed solely to receive freight-money, but not to let the ship to freight, and he should let the ship to freight, the owner will not be bound. On the other hand, if he is appointed to let the ship to freight, but not to receive the freight-money, the owner will not be bound by his receipt of the freight-money. In like manner, if he is appointed to carry passengers, he is not at liberty to carry goods; and so conversely. And in all such cases, the owner will not be bound by his acts, when he exceeds his authority. So, if the master is appointed to let the ship to carry certain kinds of merchandise, which she is adapted to carry, such, for example, as grain, or hemp, and the master should let the ship to carry marble, or other materials, it will be an excess of authority not binding upon the owner.[3] Some of these cases may not appear as cogent in our law as they do in the Roman law; but they sufficiently illustrate the general principle.[4]

[1] Ante, §§ 119, 119 *a*.

[2] Abbott on Shipp. Pt. 2, ch. 3, § 3 (Amer. ed. 1829); Webster *v.* Seekamp, 4 B. & Ald. 352; Arthur *v.* Barton, 6 Mees. & Wels. 138, 143; The Ship Fortitude, 3 Sumner, 228.

[3] Dig. Lib. 14, tit. 1, l. 1, § 12; Pothier, Pand. Lib. 14, tit. 1, n. 7; 1 Liverm. on Agency, 155, 156 (ed. 1818); Abbott on Shipp. Pt. 2, ch. 2, § 3 (Amer. ed. 1829).

[4] The exact text of the Roman law is as follows: Igitur præpositio certam legem dat contrahentibus. Quære, si eum præposuit navi ad hoc solum, ut vecturas exigat, non ut locet; quod fortè ipse locaverat; non tenebitur exercitor, si magister locaverit: vel si ad locandum tantum, non ad exigendum, idem erit dicendum: aut, si ad hoc, ut vectoribus locet, non ut mercibus navem præstet vel contra, modum egressus, non obligabit exercitorem. Sed, et si, ut certis mercibus eam locet præpositus est, putà legumini, cannabæ ille marmoribus, vel alia materia, locavit; dicendum erit non teneri. Quædam enim naves onerariæ, quædam (ut ipsi dicunt) ἐπιβατηγοὶ (id est, vectorum ductrices) sunt. Et plerosque mandare scio, ne vectores recipiant. Et sic, ut certa regione, et certo Mari negotietur; ut ecce, sunt naves, quæ *Brundusium* à *Cassiopa*, vel à *Dyrracchio* vectores trajiciunt, ad onera inhabiles. Item quædam fluvii capaces, ad mare non sufficientes. Dig. 14, tit. 1, l. 1, § 12. I interpret this passage as Mr. Abbott and Mr. Livermore do, as applicable to cases where the

§ 123 *a*. Hitherto we have principally looked to the powers of masters of ships; but it may not be amiss here to glance at a general duty arising out of their employment, which indeed might equally apply to other agents under the like circumstances. It is, that the master of a ship is bound to employ his whole time and attention in the service of his employer; and it is even said that a custom, allowing such master to trade upon his private account during the voyage, cannot be maintained.[1] Perhaps this is laying down the rule somewhat too broadly, for if there be an express agreement between the master and owner that he shall be at liberty to trade upon his own account during the voyage, that would certainly be obligatory; and if there be a known usage in the particular trade to the same effect, that would seem to afford an equally conclusive presumption of an implied agreement to the same effect.

§ 124. Sixthly. Partners. It is not our design to enter upon any general examination of the rights, powers, and duties of partners at large. That would properly belong to a distinct treatise on partnership. But we shall here advert only to the general authorities deduced by law from the very nature and character of partnership. Every partner is (as we have seen), in contemplation of law, the general and accredited agent of the partnership;[2] or, as it is

extent of the authority of the master is deduced from the general employment of the ship. 1 Liverm. on Agency, 155, 156 (ed. 1818); Abbott on Shipp. Pt. 2, ch. 2, § 3, p. 92 (Amer. ed. 1829). The modern commercial code of France (as indeed do the general principles of the maritime law of other nations) recognizes distinctions as to the authority of the master of a ship in most cases coincident with those of the common law. Thus, the commercial code of France (art. 223), gives authority to the master to engage the crew employed in the ship, in concert with the owner, when the master is at his place of residence. The master (art. 232), in the place of the residence of the owners or their agents, has no general authority to repair the vessel, or to buy sails, cordage, or other things for her use, or to take up money on bottomry, or to let the ship on freight. See also 1 Bell, Comm. §§ 433–436, pp. 412–414 (4th ed.); Id. pp. 522–530 (5th ed.); Pothier on Marit. Contracts, by Cushing, n. 48, 49, pp. 26–28; Id. n. 163, pp. 98, 99; Jacobsen's Sea Laws, by Frick, ch. 1, pp. 32–91; 3 Kent, Comm. Lect. 46, pp. 158–176 (4th ed.); 2 Stair, Inst. by Brodie, Supp. pp. 953, 969–971, 973, 980, 981; Ante, §§ 117, 119, 121, 122.

[1] Gardner *v.* McCutcheon, 4 Beavan, 534.

[2] Ante, § 37; 2 Bell, Comm. § 1230, p. 615 (4th ed.); Id. p. 615 (5th ed.); Pothier on Oblig. by Evans, n. 83; Story on Partn. ch. 7, §§ 101–103. How far one partner could bind the firm by his acts under the Roman law, is a matter which has been much discussed by the civilians. That each partner could bind all the others, when there was an express or implied authority for this purpose, is not doubted. But in the absence of an express authority, the difficulty has been to ascertain what circumstances should afford a just presump-

sometimes expressed, each partner is *præpositus negotiis societatis;* and may consequently bind all the other partners by his acts in all matters, which are within the scope and objects of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property; he may buy goods on account of the partnership; he may borrow money, contract debts, and pay debts on account of the partnership; he may draw, make, sign, indorse, accept, transfer, negotiate, and procure to be discounted, promissory notes, bills of exchange, checks, and other negotiable paper, in the name and on account of the partnership.[1]

tion of authority. The mere relations of partnership did not, as it should seem, in the Roman law, create such an implied authority as it does in our law. See Ersk. Inst. B. 3, tit. 3, § 20; 1 Stair, Inst. B. 1, tit. 16, § 6; 1 Domat, B. 1, tit. 8, § 4, art. 16; Dig. Lib. 17, tit. 2, l. 68; Pothier, Pand. Lib. 17, tit. 2, n. 26; [Tozier *v.* Crafts, 123 Mass. 480].

[1] Ante, § 37; see Collyer on Partn. B. 3, ch. 1, §§ 1 & 2, pp. 215–230; 3 Kent, Comm. Lect. 43, pp. 40–48 (4th ed.); Story on Partn. ch. 7, §§ 101–125; Bayley on Bills, ch. 2, § 6 (5th ed.); Id. ch. 6, § 1; 3 Chitty on Com. & Manuf. 236–238; South Carolina Bank *v.* Case, 8 B. & Cressw. 427; Vere *v.* Ashby, 10 B. & Cressw. 288; *Ex parte* Bondonus, 8 Ves. 540; *Ex parte* Agace, 2 Cox, 312; United States Bank *v.* Binney and Windship, 5 Mason, 176; s. c. 5 Peters, 529; 1 Domat, B. 1, tit. 16, § 3, art. 7; Ersk. Inst. B. 3, tit. 3, § 20; 2 Bell, Comm. § 1203, pp. 615–618 (4th ed.); Id. pp. 615–617 (5th ed.); 1 Stair, Inst. by Brodie, B. 1, tit. 16, §§ 4, 6; Pothier on Oblig. by Evans, n. 83. [Thus one partner has no implied authority to open a banking account on behalf of the partnership in his own name. Alliance Bank *v.* Kearsley, L. R. 6 C. P. 433. But if one partner signs the names of both partners to a lease, and both enter under it, this acts as a ratification of the act by the partner who did not sign the lease himself. Holbrook *v.* Chamberlin, 116 Mass. 155. The rule authorizing one partner to bind the firm by commercial paper only applies to business or trading copartnerships. It has no application to partnerships formed for agricultural purposes. Hunt *v.* Chapin, 6 Lans. 139. Where an agent for a sewing-machine company takes a partner, he becomes liable to the company for the amounts received by himself and his partner, and the sureties on his bond to the company must refund all moneys not paid over by his partner, as he is bound by his defaults. Hayden *v.* Hill, 52 Vt. 259. And it has been held that even though two railroads were continuous, and an association engaged in shipping goods between points connected by these roads and using its own cars and employing agents distinct from those of these roads, was in the habit of giving through bills of lading between these points and distributing freight earned among the roads in proportion to the amount earned by each, these facts did not constitute a partnership on the part of the railroads, nor prove that the shipping association acted as their agents, so as to make them liable to the plaintiff. Watkins *v.* T. H. & I. R. R. Co., 14 Am. L. Rev. 173. And partners are liable, *in solido*, for torts of one of the firm, if committed in the course of the business. Loomis *v.* Barker, 69 Ill. 360. See also Coursin's Appeal, 79 Pa. St. 220; Brooks *v.* Martin, 2 Wall. 70; Saunders *v.* Bartlett, 12 Heisk. 316. And see new edition Story on Partnership. — ED.]

§ 125. The restrictions of this implied authority of partners to bind the partnership, are apparent from what has been already stated. Each partner is an agent only in and for the business of the firm; and therefore his acts beyond that business will not bind the firm.[1] Neither will his acts, done in violation of his duty to the firm, bind it, when the other party to the transaction is cognizant of, or co-operates in such breach of duty.[2] And upon the principle already suggested, as to agents executing sealed instruments, one partner cannot execute an instrument, under seal, which shall bind the other partners, in virtue of his general authority; but he must have a special authority under seal;[3] or the deed must be executed by him in the presence of the other partners.[4]

§ 126. Before quitting this subject of the nature and extent of the authority of agents, it seems proper to refer again to what has been already incidentally stated, the distinction commonly taken between the case of a general agent and that of a special agent, the former being appointed to act in his principal's affairs generally, and the latter to act concerning some particular object.[5] In the former case, the principal will be bound by the acts of his agent within the scope of the general authority conferred on him, although he violates by those acts his private instructions and directions, which are given to him by the principal, limiting, qualifying, suspending, or prohibiting the exercise of such authority under particular circumstances.[6] In the latter case, if the

[1] Hasleman *v.* Young, 5 Adolph. & Ellis, 833.

[2] 3 Kent, Comm. Lect. 43, pp. 46, 47 (4th ed.); Collyer on Partn. B. 3, ch. 1, p. 212, and § 1, p. 215; Id. ch. 2, § 1, pp. 256–286; 2 Bell, Comm. § 1203, pp. 615–618 (4th ed.); Id. pp. 615–618 (5th ed.); *Ex parte* Agace, 2 Cox, 312, 316; Sandilands *v.* Marsh, 2 B. & Ald. 673; [Kendal *v.* Wood, L. R. 6 Ex. 243].

[3] Ante, §§ 37, 51; Post, §§ 242, 252; 3 Kent, Comm. Lect. 43, pp. 47, 48 (4th ed.); Harrison *v.* Jackson, 7 T. R. 207; Collyer on Partn. B. 3, ch. 2, § 1, pp. 256, 257. *Contra*, Cady *v.* Shepherd, 11 Pick. 400, referred to Ante, § 49, and note, § 51; Post, §§ 242, 252; Story on Partn. §§ 117–123. In consequence of this doctrine, or, at least, to clear away all doubts on the subject, a statute has been passed by Congress (Act of 1823, ch. 149, § 25; 3 U. S. Laws, p. 1889, Story's ed.) by which one partner is authorized to bind the firm in bonds given to the custom-house for duties.

[4] Ante, §§ 49, 51; Story on Partn. §§ 117–123; [Holbrook *v.* Chamberlin, 116 Mass. 155].

[5] Ante, §§ 17–20, 73; Post, §§ 131–133; Tomlinson *v.* Collett, 3 Blackf. (Ind.) 436; Walker *v.* Skipwith, Meigs (Tenn.), 502.

[6] Ante, § 73; Post, §§ 127–133; Allen *v.* Ogden, 1 Wash. Cir. 174. [Thus, where by the rules of a railroad company, the baggage master was forbidden

agent exceeds the special and limited authority conferred on him, the principal is not bound by his acts, but they become mere nullities, so far as he is concerned; unless, indeed, he has held him out as possessing a more enlarged authority.[1]

to take articles of merchandise on passenger trains, the company was held liable for the loss of a carpet, which he took for a passenger who did not know the rule. Minter *v.* Pac. R. R. Co., 41 Mo. 503; Bell *v.* Offutt, 10 Bush (Ky.), 632. And a principal is liable for the purchases of a general agent, although he purchases a larger quantity than the principal authorized him to. Palmer *v.* Cheney, 35 Ia. 281. So, where the general agent of the owner of real estate gave a lease under seal in the name of his principal, and received the rent thereunder, it was held that a surrender of the lease to the agent, and the acceptance thereof by him, was a good defence to an action brought by the principal. Amory *v.* Kannoffsky, 117 Mass. 351; Cruzan *v.* Smith, 41 Ind. 288; Mason *v.* Bauman, 62 Ill. 76; Bryant *v.* Moore, 26 Me. 84; Fitzsimmons *v.* Joslin, 21 Vt. 129; Butler *v.* Maples, 9 Wall. 766; Thurber *v.* Anderson, 88 Ill. 167. — ED.]

[1] Post, § 127, and note, §§ 128–133; 2 Kent, Comm. Lect. 41, pp. 620, 621 (4th ed.); 3 Chitty on Com. & Manuf. 198; Smith on Mercantile Law, 58–62 (2d ed.); Id. ch. 5, § 4, pp. 107, 108 (3d ed. 1843); Fenn *v.* Harrison, 3 T. R. 757; Howard *v.* Braithwaite, 1 Ves. & B. 209, 210; Whitehead *v.* Tuckett, 15 East, 408; Pickering *v.* Busk, 15 East, 38, 43, 44; 1 Bell, Comm. § 412, p. 387 (4th ed.); Id. p. 478 (5th. ed.); Munn *v.* Commission Co. 15 John. 44, 54; Rossiter *v.* Rossiter, 8 Wend. 494; Andrews *v.* Kneeland, 6 Cowen, 354; Waters *v.* Brogden, 1 Younge & Jerv. 457; Brown *v.* Trantum, 6 Mill. (La.) 47; Beals *v.* Allen, 18 John. 363; Allen *v.* Ogden, 1 Wash. Cir. 174. The same principle is applied in the case of partnership. Each partner is held out to the public as the general agent of the partnership; and, consequently, his acts will bind it, notwithstanding he may have violated his private instructions or the express terms of the secret articles of partnership. Sandilands *v.* Marsh, 2 B. & Ald. 673; United States Bank *v.* Binney, 5 Mason, 176; s. c. 5 Peters, 529; Collyer on Partn. by Phillips, ch. 1, pp. 212–215, and note; 3 Kent, Comm. Lect. 43, pp. 40–50 (4th ed.); 3 Chitty on Com. & Manuf. ch. 4, pp. 236–241. Mr. Smith, in his work on Mercantile Law, p. 59 (2d ed.), has stated the distinction between general and special agents very perspicuously. "A general agent is a person," says he, "whom a man puts in his place, to transact all his business of a particular kind; thus, a man usually retains a factor to buy and sell all goods, and a broker to negotiate all contracts of a certain description, an attorney to transact all his legal business, a master to perform all things relating to the usual employment of his ship, and so in other instances. The authority of such agent to perform all things usual in the line of business in which he is employed, cannot be limited by any private order or direction, not known to the party dealing with him. But the rule is directly the reverse concerning a particular agent, that is, an agent employed specially in one single transaction; for it is the duty of the party dealing with such a one, to ascertain the extent of his authority; and if he do not, he must abide the consequences." S. P. Smith on Merc. Law, ch. 5, § 4, pp. 107, 108 (3d ed. 1843). This is true, if the agent is not held out as possessing a more enlarged authority. See also Woodin *v.* Burford, 2 Crompt. & Mees. 391; Jordan *v.* Norton, 4 Mees. & Wels. 155; Sykes *v.*

§ 127. The ground of this distinction is the public policy of preventing frauds upon innocent persons, and the encouragement of confidence in dealings with agents. If a person is held out to third persons, or to the public at large, by the principal, as having a general authority to act for and to bind him in a particular business, or employment, it would be the height of injustice, and lead to the grossest frauds, to allow him to set up his own secret and private instructions to the agent, limiting that authority; and thus to defeat his acts and transactions under the agency, when the party dealing with him had, and could have, no notice of such instructions. In such cases, good faith requires that the principal should be held bound by the acts of the agent, within the scope of his general authority; for he has held him out to the public as competent to do the acts, and to bind him thereby. The maxim of natural justice here applies with its full force, that he, who, without intentional fraud, has enabled any person to do an act, which must be injurious to himself, or to another innocent party, shall himself suffer the injury rather than the innocent party, who has placed confidence in him.[1] The maxim is founded in the

Giles, 5 Mees. & Wels. 645; Post, § 127, note, § 128, note; [Smith *v.* East India Co. 16 Simons, 76; Ladd *v.* Town of Franklin, 37 Conn. 53; Martin *v.* Farnsworth, 49 N. Y. 555; Cutler *v.* Boyd, 124 Mass. 181; Homer *v.* Sinnott, 119 Mass. 191; Herbert *v.* Kneeland, 24 Boston Law Rep. 495; 32 Vt. 316; Hatch *v.* Taylor, 10 N. H. 538].

[1] Whitehead *v.* Tuckett, 15 East, 401, 409; 3 Kent, Comm. Lect. 41, pp. 620, 621 (4th ed.); 3 Chitty on Com. & Manuf. 202; Guerreiro *v.* Peile, 3 B. & Ald. 616; Ante, § 73. See North River Bank *v.* Aymar, 3 Hill. 262; Commercial Bank of Buffalo *v.* Kortright, 22 Wend. 348, 361; Post, § 470; Locke *v.* Stearns, 1 Met. 560. The general ground, on which this distinction is taken, is well stated in a note to Paley on Agency, by Lloyd (p. 199, note.) "A general authority," says Mr. Lloyd, "arises from a general employment in a specific capacity; such as factor, broker, attorney, &c. When we can say of any one, that he is A.'s broker, or A.'s factor, or A.'s attorney, he has then a general authority, in the sense in which it is used in the text. But, of course, this does not imply that he has an unlimited or unrestrained authority. A. may give his broker, or his factor, or his attorney, any instructions that he pleases; and the effect will be this: As between himself and his broker, &c., any deviation from these instructions will render the latter accountable to him for any loss he may sustain thereby. But, as regards himself and third parties, who may have dealt with the broker, &c., any limitation of the authority not communicated to them, can have no effect. A third person has a right to assume, without notice to the contrary, that the person whom A. employs generally as his broker, &c., has also an unqualified authority to act for his principal in all matters which come within the scope of that employment. In the case of a particular agent, that is, one whom A. may have employed specially

soundest ethics, and is enforced to a large extent by courts of equity.[1] Of course the maxim fails in its application, when the

in that single instance, no such assumption can reasonably be made. It then becomes the duty of the party dealing with one whom he knows to be acting for another in the transaction, to ascertain by inquiry the nature and extent of the authority; and if it be departed from or exceeded, he must be content to abide the consequences. The distinction thus pointed out is perfectly consonant with right reason; and if duly attended to will satisfactorily explain all the cases which follow in the text." In Fitzherbert *v.* Mather, 1 T. R. 12, 16, Mr. Justice Buller said: "It is the common question every day at Guildhall, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit." See also Hearn *v.* Nichols, 1 Salk. 289. [See Mr. Holmes's note "*Seeming Powers of Agents*," 2 Kent, Comm. (12th ed.) p. 621; Nussbaum *v.* Heilbron, 63 Ga. 312; Sterling Bridge Co. *v.* Baker, 75 Ill. 139; City Bank of Macon *v.* Kent, 57 Ga. 283; Carmichael *v.* Buck, 10 Rich. 332; Houghton *v.* First National Bank of Elkhorn, 26 Wis. 663.]

[1] 1 Story on Eq. Jurisp. §§ 384–394; Fitzherbert *v.* Mather, 1 T. R. 12, 16. It has been already suggested, Ante, § 73, that the same general principle pervades all cases of agency, whether the party be a general or a special agent. But, nevertheless, the distinction between general and special agents is not unfounded or useless. It is sufficient to solve many cases. But the difficulty is, that from the general language in the books, and the general contrast made between general and special agents, there is great danger in applying the distinction to solve cases to which it does not properly apply. The principle, which pervades all cases of agency, whether it be a general or a special agency, is this: The principal is bound by all acts of his agent, within the scope of the authority which he holds him out to the world to possess; although he may have given him more limited private instructions, unknown to the persons dealing with him. And this is founded on the doctrine, that where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence, and having authority in that matter, shall be bound by it. It will at once be perceived, this doctrine is equally applicable to all cases of agency, whether it be the case of a general, or of a special agency. When I hold out to the public a person as my agent in all my business and employment, he is deemed my general agent; and all acts done within the scope of that business bind me, notwithstanding I have privately limited his authority by special instructions. Why? Because he is externally clothed with an unlimited authority over the subject-matter, and third persons might otherwise be defrauded by his acts. In such a case, he is not less a general agent as to third persons, than if he had received no private limitations of his authority. As between himself and his principal, his authority is not general, but *quoad hoc* is limited. In the same case, if the principal had privately revoked his whole authority, he would still be bound. So, if he had privately limited the authority to a single act in the same business (and he would accordingly be, between himself and his principal, a special agent), still the principal would be bound. Precisely the same rule applies to a special agency. If A. authorizes B. to purchase ten bales of cotton for him, and holds out to all the public, that B. has full and unlimited authority to purchase that cotton, every person, dealing with that agent, has a right to deal with him as a person having a

party dealing with the agent, has a full knowledge of the private instructions of the agent, or that he is exceeding his authority.[1]

§ 128. The same rule was also fully recognized, and applied with rigorous exactness in the Roman law, even in cases otherwise highly favored. Even a creditor, having a pledge, was bound, if he suffered the owner to hold himself out as competent to dispose of the pledge, with the consent of the creditor. "Creditor, qui permittet rem vendiri, pignus dimittit.[2] Si consensit venditioni creditor, liberatur hypotheca."[3] So, the acts of a shipmaster, as a general agent within the scope of his authority (as we have seen), were, for the like reason, deemed binding on his employer, although he had disobeyed his private instructions.[4] "Omnia enim facta magistri debet præstare, qui eum præposuit; alioquin, contrahentes decipientur; et facilius hoc in magistro, quam Institore, admittendum, propter utilitatem."[5] Here, we see, that the same grounds of the rule are given,

general authority as to that purchase; and the principal will be bound by his acts, notwithstanding he may have privately limited the agent as to price, quality, &c. In the case of a general agency, the principal holds out the agent to the public as having unlimited authority as to all his business. In the case of a special agency, like that above stated, the principal holds out the agent to the public as having unlimited authority as to a particular act, subject, or purchase. In each case, therefore, the same general principle applies. If the principal hold out to the public his agent, as having a general authority to bind him in one case, or in all cases, he who deals with any such agent innocently, ought to be protected, and the principal to be bound. The cases of special agency to which the rule, founded upon the distinction between general agency and special agency, properly applies, are, where the principal does not hold out the agent as possessing any particular authority; and, of course, where the nature and extent of the real authority, conferred on him, furnish the only rule to govern the case; and the party, dealing with the agent, must act at his own peril. We do not, in legal language, or common parlance, call an agent a general agent, merely because there are no limitations on his authority; nor do we call a man a special agent, because he is limited by special orders, *quoad* that agency. Neither do we call a man a general agent, who is appointed to do one act, or to make one purchase, although he has unlimited authority to do that act. There would be no just logical objection to such distinctions; but the cases in the books do not make them. And if they did, the distinctions would not meet to solve the difficulties in the authorities. Ante, §§ 73, 127, note; Post, §§ 129, 133; [Duke of Beaufort *v.* Neeld, 12 Cl. & F. 290].

[1] Howard *v.* Braithwaite, 1 Ves. & B. 209; Stainer *v.* Tysen, 3 Hill, 279; [Barnard *v.* Wheeler, 24 Me. 412].

[2] Dig. Lib. 50, tit. 17, l. 158; 1 Story on Eq. Jurisp. § 394.

[3] Dig. Lib. 20, tit. 6, l. 7; 1 Story on Eq. Jurisp. § 394.

[4] Ante, §§ 119, 120.

[5] Dig. Lib. 14, tit. 1, l. 1, § 5; Ante, § 117; 1 Domat, B. 1, tit. 16, § 3, art. 3.

as in the common law, to prevent any deception upon the innocent and unwary, and also to further and sustain the public policy of inviting confidence in all matters of navigation, trade, and business.[1]

§ 129. The same distinction was familiarly exemplified in the civil law, by the case of an authority, even to buy a single thing for the principal. If the agent was authorized to buy generally, without fixing any price for the thing, the principal was bound by his purchase, at any price whatsoever. But, if the agent was limited as to price, then he could not bind the principal beyond that price. The former was a general, the latter a limited, authority. "Et quidem, si mandavi tibi, ut aliquam rem mihi emeres, nec de pretio quidquam statui, tuque emisti; utrinque actio nascitur. Quod, si pretium statui, tuque pluris emisti; quidam negaverunt, te mandati habere actionem, etiamsi paratus esses, id, quod excedit, remittere; namque iniquum est, non esse mihi cum illo actionem, si nolit; illi vero, si velit, mecum esse. Sed Proculus recte eum, usque ad pretium statutum, acturum existimat; quæ sententia sane benignior est."[2]

§ 130. Pothier has laid down the general rule in a very satisfactory manner, and says: "But the contract made by my agent, in my name, would be obligatory upon me, if he did not exceed the power with which he was ostensibly invested; and I could not avail myself of having given him any secret instructions, which he had not pursued. His deviation from these instructions might give me a right of action against himself, but could not exonerate me in respect of the third person, with whom he had contracted conformably to his apparent authority; otherwise, no one could be safe in contracting with the agent of an absent person."[3]

§ 131. The illustrations in our law of the same distinction between general agents and limited or special agents, may be familiarly seen in the common case of factors known to be such. They possess a general authority to sell; and if in selling they violate their private instructions, the principal is nevertheless bound.[4]

[1] Ante, §§ 126, 127.

[2] Dig. Lib. 17, tit. 1, l. 3, §§ 1, 2; Id. l. 4; Pothier, Pand. Lib. 17, tit. 1, n. 42–44; 3 Chitty on Com. & Manuf. 199; Hicks v. Hankin, 4 Esp. 114.

[3] 1 Pothier on Oblig. by Evans, n. 79. See also Id. n. 447, 448; Ante, §§ 73, 127–129.

[4] Fenn v. Harrison, 3 T. R. 757, 762; s. c. 4 T. R. 177; Ante, §§ 73, 127, 128; Whitehead v. Tuckett, 15 East, 400; 3 Chitty on Com. & Manuf. 198, 199; Pickering v. Busk, 15 East, 38, 43; Smith on Merc. Law, 57–60 (2d ed.);

And it makes no difference, in a case of this kind, whether the factor (if known to be such) has been ordinarily employed by the principal to sell, or whether it is the first and only instance of his being so employed by the principal; for still, being a known factor, he is held out by the principal as possessing, in effect, all the ordinary general authority of a factor, in relation to the particular sale.[1] But if a common person, not being a factor, should be authorized to make a like sale, and he should violate his private instructions, and deviate from his authority in the sale, the principal would not be bound. In such a case, no general authority is presumed, and he who deals with such an agent deals with him at his own peril; for, in such a case, the principal has not held the agent out as a general agent.[2]

§ 132. So (it has been said), if a person keeping a livery-stable, and having a horse to sell, intrusts a servant with power to sell a horse, and directs him not to warrant the horse; and the servant, nevertheless, upon the sale, should warrant him, the master would be bound by the warranty; because the servant was acting within

Id. ch. 5, § 4, pp. 107, 108 (3d ed. 1843); Daniel *v.* Adams, Ambl. 495, 498; [Johnson *v.* Jones, 4 Barb. (N. Y.) 369. The statement in the text is doubted by Bramwell, B., in Baines *v.* Ewing, 4 Hurl. & C. 511, 516, who says: "Reference has been made to Story on Agency, § 131, where it is said that the distinction between general agents and limited or special agents may be illustrated by the case of a factor who has a general authority to sell; and if in selling he violates his private instructions, the principal is nevertheless bound. Among others, the case of Fenn *v.* Harrison is cited; but it does not warrant the proposition. I can well understand that if a factor is simply employed to sell, he has a general authority to sell in the usual way; but I doubt whether when a factor is authorized to sell at a particular price, he can bind his principal by a sale at a less price. I do not think that any of the authorities referred to by Mr. Justice Story warrant such an inference." — G.]

[1] Ib.; Ante, §§ 73, 81, 127, 128; [Cameron *v.* Durkheim, 55 N. Y. 425].

[2] Ante, §§ 73, 127–129; Fenn *v.* Harrison, 3 T. R. 757, 762; s. c. 4 T. R. 177; East India Co. *v.* Hensley, 1 Esp. 112; 3 Kent, Comm. Lect. 41, pp. 620 621 (4th ed.); Pickering *v.* Busk, 15 East, 38, 43; Gibson *v.* Colt, 7 John. 390; Munn *v.* Commission Co., 15 John. 44, 54; Rossiter *v.* Rossiter, 8 Wend. 494; Tradesmen's Bank *v.* Astor, 11 Wend. 87; Ante, § 127, note, § 128, note; Lobdell *v.* Baker, 1 Met. 193. [Thus, where an agent to sell land, with specific instructions from his principal, exceeded them by giving an option to the purchaser for thirty days, and by agreeing that in case he should decide to take the land, and the title was not perfect, that the vendor should pay a certain sum of money, it was held that the contract was not binding upon the principal. Baxter *v.* Lamont, 60 Ill. 287. So, an agent employed to sell land has no power to exchange it, and any person trading with him must take notice of his authority to do the act in question. Lumpkin *v.* Wilson, 5 Heisk. 555; Reed *v.* Welsh, 11 Bush (Ky.), 450. — Ed.]

the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and the servant.[1] But if the owner of a horse should send the horse to a fair by a stranger, with express directions not to warrant him; and the latter should, on the sale, contrary to his orders, warrant him, the owner would not be bound by the warranty.[2]

§ 133. This distinction between cases of general agency and those of special agency, may seem, at first view, to import a difference of doctrine founded more in arbitrary rules, than in just reasoning. But, properly considered, the same principle pervades and governs each of the cases. So far as the agent, whether he is a general or a special agent, is in any case held out to the public at large, or to third persons dealing with him, as competent to contract for, and to bind the principal, the latter will be bound by the acts of the agent, notwithstanding he may have deviated from his secret instructions and orders; for otherwise such secret instructions and orders would operate as a fraud upon the unsuspecting confidence and conduct of the other party.[3] Thus, for example, if a merchant should appoint a special agent *pro hac vice*, to buy or

[1] Ante, § 59, 99, and note; Post, § 420, note.

[2] Per Ashurst, J., in Fenn *v.* Harrison, 3 T. R. 760, 761. But see Seignior and Walmer's case, Godbolt, 360, cited in Paley on Agency, by Lloyd, p. 323, and Post, § 421, note. The principle of these cases is clear; but the whole distinction turns upon this, as to the livery-stable keeper, whether the servant had, from the nature of his employment or the business of his master, a general authority. In America, livery-stable keepers are not understood to give their servants any general authority to sell their horses. Mr. Justice Bayley, in Pickering *v.* Busk, 15 East, 45, has put the case in its true light, as being that of a horse-dealer. "If," said he, "the servant of a horse-dealer, with express directions not to warrant, do warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed." [An agent, with express authority to sell, has no implied authority to warrant, where the property is of a description not usually sold with a warranty. Smith *v.* Tracy, 36 N. Y. 79. But a general agent for the sale of reapers is presumed to be invested with a power to warrant them. Murray *v.* Brooks, 41 Ia. 45; Milburn *v.* Belloni, 34 Barb. 607. And where a servant sells a horse, and without authority warrants him, the master, having received the price enhanced by the warranty, even though ignorant of it, is responsible. Helyear *v.* Hawke, 5 Esp. 72; Alexander *v.* Gibson, 2 Camp. 555; Coleman *v.* Riches, 29 Eng. L. & Eq. 326. — ED.]

[3] Jeffrey *v.* Bigelow, 13 Wend. 518; Ante, §§ 73, 127–132; Anderson *v.* Coonley, 21 Wend. 279; Munn *v.* Commission Co., 15 John. 44, 54; Andrews *v.* Kneeland, 6 Cowen, 354; [Eilenberger *v.* Protective Fire Ins. Co., 89 Pa. St. 464; City Bank of Macon *v.* Kent, 57 Ga. 283].

sell a cargo of cotton for him, in his discretion; and he should, by an open letter, state that he had so authorized the agent to buy or sell on his account, and that he would ratify and confirm his acts in the premises; a person, who should deal with the agent upon the faith of that letter, and buy or sell the cargo of cotton accordingly, would be entitled to hold the principal bound by the acts of the agent, although the latter might have violated his secret instructions as to the price of the cotton purchased or sold. The law, in such a case, would hold the authority to purchase to be general upon the face of the letter, and the agent to possess authority to bind his principal, in regard to such purchase or sale, as much as if he had been a general agent, accustomed to make purchases, in numerous cases of the same sort for the principal.[1] But where the agency is not held out by the principal, by any acts, or declarations, or implications, to be general in regard to the particular act or business, it must from necessity be construed according to its real nature and extent; and the other party must act at his own peril, and is bound to inquire into the nature and extent of the authority

[1] See Schimmelpennich *v.* Bayard, 1 Pet. 264; Ante, §§ 73, 127, note; Withington *v.* Herring, 5 Bing. 442. The whole difficulty, in considering this doctrine, arises from confounding two things with each other, which are essentially distinct, namely, the extent of the authority given to an agent, whether it be limited or unlimited, with the nature of the agency, in which he is employed, whether it be general or special. A person may be a general agent, that is, he may be employed in the general business of his principal; and yet he may be privately limited, in the exercise of his agency, by certain instructions given by his principal, far within the general scope of that business. Ante, § 73. On the other hand, he may be a special agent, that is, he may be employed for a particular object only; and yet he may have an unlimited authority to act within the scope of his agency in that particular affair, or he may be limited therein by like instructions. Ante, §§ 17, 18, 127, note. In each case, so far as he is held out to persons dealing with him, as having general power to act in the premises, that is, as having unlimited authority to act within the scope of his agency, whether general or special, his acts bind his principal, notwithstanding his private and limited instructions. In each case, if the instructions and limitations upon his authority are known to persons dealing with him, and the agent exceeds them, the principal will not be bound. Mr. Smith, in his excellent Compendium of Mercantile Law, pp. 46, 47 (2d ed.), has stated the distinction with clearness and brevity. "The appointment (of the agent) is his only authority. It may be *general*, to act in all his principal's affairs, or *special*, concerning some particular object. It may be limited by certain instructions, as to the conduct he is to pursue, or unlimited, leaving his conduct to his own discretion." S. P. Smith on Merc. Law, ch. 5, § 2, p. 91 (3d ed. 1843). See also the reasoning of Mr. Chief Justice Savage, in Jeffrey *v.* Bigelow, 13 Wend. 518; Ante, § 127, note, § 128, note, § 129, note; Andrews *v.* Kneeland, 6 Cowen, 354.

actually conferred.[1] In such a case, there is no ground to contend, that the principal ought to be bound by the acts of the agent, beyond

[1] Ante, § 127, note, § 128, note; Snow *v.* Perry, 9 Pick. 542; Rossiter *v.* Rossiter, 8 Wend. 494; Denning *v.* Smith, 3 Johns. Ch. 344; Lobdell *v.* Baker, 1 Met. 173. [Thus, where an agent makes negotiable paper in the name of his principal, and payable to himself, a party taking it does so at his peril. New York Iron Mine *v.* Negaunee Bank, 39 Mich. 644. And where a broker received orders to buy merchandise by letter, which was the only order the broker had, it was held that this constituted him a special agent, with authority to bind his principal only as specified in the letter. Bell *v.* Offutt, 10 Bush (Ky.), 632. So, a special authority from the owner to look up property mislaid or lost by a common carrier, does not imply any authority to settle for the damages resulting from the carrier's neglect. Congar *v.* Galena R. R. Co., 17 Wisc. 477. And it has been held that the president of a railroad company, who is the business and financial agent of the corporation, has no right to mortgage a locomotive belonging to the corporation, even to secure a debt of the corporation, Luse *v.* Isthmus R. Trans. Co., 6 Oregon, 125: nor has he authority to execute a power of attorney to institute a suit, without authority from the board of directors, Citizens' Bank *v.* Keim, 10 Phil. 311. Nor can an agent, who is employed merely to carry out and perform a contract already made, change the contract or make a new one. Gerrish *v.* Maher, 70 Ill. 470. So, where a treasurer of a corporation sent a check in a sealed envelope, which he had indorsed to the order of the cashier of a bank, to which it was sent for deposit, and the messenger opened the envelope and drew the amount of the check, it was held that the corporation could recover their loss from the bank, on the ground that the messenger was only a special agent, and as he exceeded his powers, his principal was not bound. Bristol Knife Co. *v.* First Nat. Bank, 41 Conn. 421. Nor has a director of a bank any authority to sanction over-drafts, Market St. Bank *v.* Stumpe, 2 Mo. App. 545: but it has been held that such director could give a mortgage to a depositor to secure payment of the deposit, Ahl *v.* Rhoads, 84 Pa. St. 319. So, where an agent had made contracts for advertising in the newspapers to an extent much greater than the whole amount of business done by his principal, it was held that third persons have no reason to suppose that powers not properly exercised in the business entrusted to him have been conferred even on a general agent by his principal. Holloway *v.* Stephens, 2 Thomp. & C. 562. So, a station agent of a railway company has no power to bind the company by a contract for transportation to points beyond its own line, Grover Machine Co. *v.* The Mo. Pac. R. Co., 70 Mo. 672: nor to employ a physician to attend an injured employé, Cairo, &c. R. R. Co. *v.* Mahoney, 82 Ill. 73: nor to contract for board and attendance for an employé of the company, although a general agent might have such authority, Atlantic, &c. R. Co. *v.* Reisner, 18 Kan. 458. So, where an agent of the plaintiffs had sold defendant a bill of goods, which was to be paid for by a bill for attendance which agent owed defendant, the latter believing that the agent had an interest in the business, it was held that plaintiffs had held agent out as their general agent only, and that defendant was bound to know the scope of his authority. Stewart *v.* Woodward, 50 Vt. 78. See Bacon *v.* Markley, 46 Ind. 116; Law *v.* Cross, 1 Black (U. S.), 533. So, in Mundorf *v.* Wickersham, 63 Pa. St. 87, where the plaintiff sued to recover the amount of his note, which he had lent the defendant on the condition that he would pro-

what he has apparently authorized; because he has not misled the confidence of the other party who has dealt with the agent. Each party is equally innocent; and, in a just sense, it cannot be said, that the principal has enabled the agent to practise any deception upon the other party. The duty of inquiring, then, is incumbent on such party, since the principal has never held the agent out, as having any general authority whatsoever in the premises. And, if he trusts without inquiry, he trusts to the good faith of the agent, and not to that of the principal.[1] This distinction between the effects of a general and a special agency seems (as we shall hereafter see) to be limited to cases of private agency; and to be inapplicable to the case of public agents, who can bind the government or the public authorities, only to the extent of the powers actually conferred on them.[2]

§ 134. We have already seen to what extent, and under what circumstances, the acts of an agent will bind his principal. It remains to consider, to what extent and under what circumstances, the representations, declarations, and admissions of an agent will also bind his principal. And here it may be laid down generally, that no representations, declarations, or admissions of an agent, will bind his principal, except in cases within the scope of the authority confided to him; subject, however, to the same distinction of which notice has been already taken, between general agents

tect it at maturity, and which the plaintiff was obliged to take up when it became due, it appeared that the note was delivered to defendant's agent, who, without authority from the defendant, signed a receipt for his principal, agreeing to protect the note at maturity, it was held that the action could be maintained. Whiting *v.* Lake, 91 Pa. St. 349. See also Reed *v.* Ashburnham R. R. Co., 120 Mass. 433, where it was held to be a question for the jury whether the president of a corporation was the authorized agent of the company in making a purchase of supplies for the use of a contractor on the road. Forsyth *v.* Hooper, 11 Allen, 419; Hall *v.* Pike, 100 Mass. 495; Equitable Life Ass. So. *v.* Poe, 53 Md. 28. And see Hatch *v.* Coddington, 95 U. S. 48. — Ed.]

[1] This doctrine has been already adverted to in another place, Ante, § 127, note, § 128, note. But I have ventured to repeat it in the text, knowing how often it is misunderstood. The case of Withington *v.* Herring, 5 Bing. 442, recognizes the true point of the distinction; and does, as I think, fully bear out the deductions in the text, as does the doctrine of Lord Kenyon, in Fenn *v.* Harrison, 3 T. R. 757, and of Lord Ellenborough, in Pickering *v.* Busk, 15 East, 38, 43, and of the Supreme Court of the United States, in Schimmelpennich *v.* Bayard, 1 Pet. 264, 290; Ante, §§ 73, 81. See Helyear *v.* Hawke, 5 Esp. 72; East India Co. *v.* Hensley, 1 Esp. 112; Andrews *v.* Kneeland, 6 Cowen, 354; [Reitz *v.* Martin, 12 Ind. 308].

[2] See Post, § 307 *a*; Lee *v.* Munroe, 7 Cranch, 366.

and limited or special agents.[1] For, where the acts of the agent will bind the principal, there his representations, declarations, and admissions, respecting the subject-matter, will also bind him, if made at the same time,[2] and constituting a part of the *res gestæ*.[3]

§ 135. Indeed, for most practical purposes, a party dealing with an agent, who is acting within the scope of his authority and employment, is to be considered as dealing with the principal himself. If it is a case of contract, it is the contract of the principal. If the agent, at the time of the contract, makes any representation, dec-

[1] Ante, §§ 126-133; Fuller *v.* Wilson, 2 Gale & Dav. 460; Post, § 307 *a*; [Graham *v.* Schmidt, 1 Sandford, Sup. Ct. (N. Y.) 74; New York Life & Trust Co. *v.* Beebee, 3 Seld. 364; Doe *v.* Robinson, 24 Miss. 688; Demerrit *v.* Meserve, 39 N. H. 521; Pritchett *v.* Sessions, 10 Rich. 298; Kelly *v.* Lehigh Valley Coal Co., 8 Daly, 291].

[2] [Thus, in an action against a railroad company for damages by a collision caused by the negligence of the engineer, his statements as to the accident, made a few days afterwards, were held to be not admissible. Robinson *v.* Fitchburg R. R., 7 Gray, 92. And so with the admission of a railway superintendent as to the unfitness of a conductor, made the day after an accident. Huntington, &c. R. R. Co. *v.* Decker, 82 Pa. St. 119. Nor is a railroad company bound by the subsequent declarations of a brakeman as to the cause of a disaster, resulting in the destruction by fire of a baggage-car, Mich. Central R. R. Co. *v.* Carrow, 73 Ill. 348: nor by the declaration of a driver of a car, which had run against and injured a person, made after the accident had occurred, and the car had been stopped, that the brakes were out of order, Luby *v.* Hudson River R. R. Co., 3 Smith (N. Y.), 131: nor by the statement of an employé in another department, made at another time and place and as a mere spectator, that he knew the car was out of repair, in an action by a fellow-employé against the railroad for injuries, Verry *v.* Burlington R. R. Co., 47 Iowa, 549: nor by a conversation a week after the alleged cause of action arose, between the plaintiff and defendant's servant with respect to the negligence of his principal, Gt. Western R. R. Co. *v.* Willis, 18 C. B. N. S. 748; Memphis R. R. Co. *v.* Maples, 63 Ala. 601. — ED.]

[3] 3 Chitty on Com. & Manuf. 208, 209; Smith on Merc. Law, 67 (2d ed.); Id. pp. 183, 124 (3d ed. 1843); Fairlie *v.* Hastings, 10 Ves. 125; 2 Stark. on Evid. *Agent*, p. 54; Marshall on Ins. B. 1, ch. 10, § 1, p. 453; Dawson *v.* Atty, 7 East, 367; Bree *v.* Holbeck, Doug. 654, 657; American Fur Co. *v.* United States, 2 Pet. 358, 364; Fitzherbert *v.* Mather, 1 T. R. 12, 15; 2 Pothier on Oblig. by Evans, App'x, No. 16, pp. 287, 288; North River Bank *v.* Aymar, 3 Hill, 262; Sandford *v.* Handy, 23 Wend. 260; Lobdell *v.* Baker, 1 Met. 193; Thallhimer *v.* Brinckerhoff, 4 Wend. 394; Lee *v.* Munroe, 7 Cranch, 366; Stewartson *v.* Watts, 8 Watts, 392; Carpenter *v.* American Ins. Co. 1 Story, 57; Randall *v.* Ches. & Del. Canal Co. 1 Harring. (Del.) 234; Post, § 387 *a*; Bank of United States *v.* Davis, 2 Hill, 451, 461, 464. [This general rule as stated in the text has been adopted without change by all courts of authority. Robinson *v.* Walton, 58 Mo. 380; McComb *v.* No. Carolina R. R. Co., 70 N. C. 178; Linblom *v.* Ramsay, 75 Ill. 246; Sweetland *v.* The Illinois, &c. Tel. Co., 27 Iowa, 433; Brooks *v.* Jameson, 55 Mo. 505; Gott *v.* Dinsmore, 111

laration, or admission, touching the matter of the contract, it is treated as the representation, declaration, or admission of the principal himself.[1] But the qualifications above stated are also most important to be attended to. The representation, declaration, or admission of the agent, does not bind the principal, if it is not made at the very time of the contract, but upon another occasion; or if it does not concern the subject-matter of the contract, but some other matter, in no degree belonging to the *res gestæ*.[2]

Mass. 45. Thus, in a suit against a railroad company for the loss of a passenger's trunk, the admissions of the conductor, baggage-master, or station-master, as to the manner of the loss, made the next morning in answer to inquiries about the trunk, are competent evidence against the company. Morse *v.* Conn. River R. R. Co., 6 Gray, 450. And in a similar action for lost freight the declaration of the freight agent that he "thought perhaps that T. had got it," was admissible against the company. Lane *v.* Boston & Albany R. R. Co., 112 Mass. 455. So, where the agent of an express company wrote the owner of a trunk, which had been lost by the company, that they would pay him fifty dollars under a rule adopted by the company, it was held that the letter of the agent admitted liability. Fox *v.* The Adams Ex. Co., 116 Mass. 292. So, where a parcel containing money had been lost, evidence that the defendant's station-master notified the police that a porter had absconded and a parcel of money was missing, was held admissible. Kirkstall Brewery Co. *v.* Furness R. Co., L. R. 9 Q. B. 468. And in an action against a manufacturing corporation for a nuisance, a statement of its superintendent that the nuisance existed and would be remedied, and that he would not have it around his place for $500, is competent evidence against the corporation. McGenness *v.* Adriatic Mills, 116 Mass. 177; see Titus *v.* Glen Falls Ins. Co., 8 Abb. N. C. 316. — Ed.]

[1] Pothier on Oblig. by Evans, App'x, No. 16, pp. 287, 288; 3 Chitty on Com. & Manuf. 207, 208; Thallhimer *v.* Brinckerhoff, 4 Wend. 394; Hubbard *v.* Elmer, 7 Wend. 446; Ante, §§ 67, 68. [Thus, in an action for the amount of a subscription to stock, the defendant alleged that it was expressly stipulated by the agent of the company, that the defendant's subscription was not to be paid until a certain amount had been subscribed: *held*, that this evidence was admissible. Rinesmith *v.* People's Freight Railway Co., 90 Pa. St. 262; McDonough *v.* Heyman, 38 Mich. 334. But the declarations of an officer of a bank in which a note has been lodged for collection, made before its maturity, are not admissible to affect the title of the holder, Wilson *v.* Bowden, 113 Mass. 422: nor can the declarations or admissions of the president of a bank be received to establish a liability against it, Henry *v.* Northern Bank, 63 Ala. 527: nor can one selectman bind a town by his admissions, Wheelock *v.* Hardwick, 48 Vt. 19: nor are the declarations of an agent having authority only to demand and receive property from the defendant, made after a refusal to deliver, and in derogation of the title of his principal, admissible, Bynum *v.* So. Pump Co., 63 Ala. 462. See Reynell *v.* Lewis, 15 M. & W. 517; Meux's Executors, 4 De G. & S. 331; Kelly *v.* Lehigh Coal Co., 8 Daly, 291; Grimshaw *v.* Paul, 76 Ill. 164. — Ed.]

[2] Peto *v.* Hague, 5 Esp. 135; Helyear *v.* Hawke, 5 Esp. 72, 74; Alexander *v.* Gibson, 2 Camp. 556; Fairlie *v.* Hastings, 10 Ves. 125; Dawson *v.* Atty, 7 East, 367; 2 Stark. on Evid. *Agent*, p. 60; 3 Chitty on Com. & Manuf. 208,

§ 136. The reasoning upon which this distinction proceeds has been very well explained by a late learned Judge.[1] "As a general proposition" (said he), "what one man says not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement; and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal; or the representations or statements may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted, to prove the agent did make that statement or representation. So, with regard to acts done, the words, with which those acts are accompanied, frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But, except in one or the other of those ways, I do not know how, what is said by an agent, can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it; though it may have some relation to the business, in which the person making that assertion was employed as agent. For instance, if it was a material fact, that there was the bond of the defendant in the hands of [the principal], that fact would not be proved by the assertion that [the agent], supposing him an agent, had said there was; for that is no fact, that is, no part of any agreement, which [the agent] is making, or of any statement he is making, as inducement to an agreement. It is mere narration; communication to the witness in the course of conversation; and, therefore, could not be evidence of the existence of the fact. The admission of an agent cannot be assimilated to the admission of

209; 2 Pothier on Oblig. by Evans, App'x, No. 16, pp. 287, 288; Thallhimer *v.* Brinckerhoff, 4 Wend. 395; Stewartson *v.* Watts, 8 Watts, 392; Hubbard *v.* Elmer, 7 Wend. 446. [The declarations of an agent are not competent evidence against his principal unless it appears when they were made, Adams *v.* Humphreys, 54 Ga. 496: and the diary of an agent which was offered to prove what took place at a certain interview, was held inadmissible, Trotter *v.* McLean, L. R. 13 Ch. D. 574: and the evidence of what an agent said in regard to a transaction already past, but while his agency for similar objects still continued, was held inadmissible to prove the contract itself, Stenhouse *v.* Charlotte, &c. R. R. Co., 70 N. C. 542. See also Ashmore *v.* Penn. Co., 38 N. J. L. 13; Johnston *v.* Thompson, 23 Hun, 90; Swasey *v.* The Union Mfg. Co., 42 Conn. 556. See Skelton *v.* Manchester, 12 R. I. 326. — ED.]

[1] Sir William Grant.

the principal. A party is bound by his own admission; and is not permitted to contradict it. But it is impossible to say [that], a man is precluded from questioning or contradicting any thing any person has asserted as to him, as to his conduct or his agreement, merely because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion."[1]

§ 137. Thus, for example, what an agent has said, or represented, at the time of the sale of a horse, which sale was authorized by his master, whether it be a representation or a warranty of soundness, or of any other quality, will be binding upon the

[1] Fairlie *v.* Hastings, 10 Ves. 126, 127; Garth *v.* Howard, 8 Bing. 451. The same doctrine is fully expounded by Mr. Justice Kennedy, in delivering the opinion of the court, in Hannay *v.* Stewart, 6 Watts, 489. "In order to determine" (says he), "whether the declarations or representations of an agent are admissible, as evidence against his principal, it may be proper, first, to state the grounds upon which they have been deemed to be so. The statements of an agent, generally, though made of the business of his principal, are not to be taken as equivalent to the admissions of the principal; for then the latter would be bound by them, whether true or false, which would render the situation of every principal truly perilous. Every man has a right to make such representations of what he has done, as he pleases, and to bind himself to abide by them, whether true or otherwise; and they, of course, may be given in evidence against him afterwards, when relevant to the issue trying; not, however, because the facts therein stated are true; but because he has the right to pledge himself in the same manner as if they were true; and if true, justice naturally requires that he should be bound by them; or if not, it is no more than the infliction of a just penalty for his disregard of truth. But it would not be reasonable to hold him responsible, upon the same principle, for the declarations of his agent; nor upon any principle, except that of truth, and the protection of those against loss or injury, that might otherwise arise, from their having confided in the representations of the agent, made by him at the time of entering into the agreement, or of transacting the business, under the authority of his principal." [But the fact of agency, or the extent of the authority of an agent, cannot generally be proved by the declarations of the alleged agent. Brigham *v.* Peters, 1 Gray, 139; Howe Machine Co. *v.* Clark, 15 Kan. 492. Such agency, however, may be inferred from the agent's previous employment in similar acts, and from the subsequent acquiescence and knowledge of the principal. Whiting *v.* Lake, 91 Pa. St. 349; Womack *v.* Bird, 63 Ala. 500; Coon *v.* Gurley, 49 Ind. 199. Thus, the declarations of a son, while performing a contract of labor and service for his father, are not admissible to prove the terms of the contract. Corbin *v.* Adams, 6 Cush. 93. See also Royal *v.* Sprinkle, 1 Jones (N. C.), 505; Byers *v.* Fowler, 14 Ark. 87; Wright *v.* Hood, 49 Wisc. 235; Columbia Bridge Co. *v.* Geisse, 38 N. J. L. 39; Burlingame *v.* Foster, 128 Mass. 125; Peck *v.* Ritchey, 66 Mo. 114; Short Mountain Coal Co. *v.* Hardy, 114 Mass. 197. — ED.]

master. But, what he has said upon the subject at another time, or upon another occasion, will not be binding upon him; for it is no part of the *res gestæ;* and did not attach, as an incident or inducement to the sale.[1] For such purposes the agent is no longer acting as agent of the master; and his declarations are not to be used as proofs against the master; but the facts contained in those declarations must be proved *aliunde.*[2] Indeed, in such cases, the agent himself may be properly called as a witness, and, hence, it has been said that his declarations are not the best evidence of the facts.[3]

[1] Helyear *v.* Hawke, 5 Esp. 72, 73; Lobdell *v.* Baker, 1 Met. 193; North River Bank *v.* Aymar, 3 Hill, 262; Hubbard *v.* Elmer, 7 Wend. 446.

[2] 2 Starkie, Evid. *Agent*, 60, 61; Langhorne *v.* Allnutt, 4 Taunt. 511; Betham *v.* Benson, Gow, N. P. C. 45; Fairlie *v.* Hastings, 10 Ves. 123; Masters *v.* Abraham, 1 Esp. 375; Hannay *v.* Stewart, 6 Watts, 489; Smith on Merc. Law, 66, 67 (2d ed.); Id. ch. 5, § 4, p. 123 (3d ed. 1843); Hubbard *v.* Elmer, 7 Wend. 446. Questions of a different nature may arise; as, for example, whether the verbal declarations of an auctioneer, at a sale, shall be permitted to countervail or vary the printed particulars of the sale; and also, whether parol declarations of an agent, during the negotiation of a contract, afterwards reduced to writing, shall be admitted to control or vary that writing. But these are questions which more properly belong to the general law of evidence, than to the doctrines of agency; since they may equally arise in the case of the principal himself, if he is the immediate party to the transaction. As to the case of the auctioneer, see Gunnis *v.* Erhart, 1 H. Bl. 289; Powell *v.* Edmunds, 12 East, 6; Howard *v.* Braithwaite, 1 Ves. & B. 210; Jones *v.* Edney, 3 Camp. 285; Ogilvie *v.* Foljambe, 3 Meriv. 53. As to the other case, see Pickering *v.* Dowson, 4 Taunt. 779; Kain *v.* Old, 2 B. & Cressw. 634; [Cooley *v.* Norton, 4 Cush. 93; Wilcox *v.* Hall, 53 Ga. 635].

[3] This suggestion does not show the true foundation of the rule, which admits or excludes the declarations and admissions of the agent; for, in all such cases, the agent may be examined under oath. But, notwithstanding that, his declarations and admissions are clearly evidence, when a part of the *res gestæ*. In Garth *v.* Howard, 8 Bing. 451, Lord Chief Justice Tindal said: "If the transaction, out of which this suit arises, had been one in the ordinary trade or business of the defendant, as a pawnbroker, in which trade the shopman was agent, or servant to the defendant, a declaration of such agent, that his master had received the goods, might probably have been evidence against the master, as it might be held within the scope of such agent's authority to give an answer to such an inquiry made by any person interested in the goods deposited with the pawnbroker. In that case, the rule laid down by the master of the rolls, in the case of Fairlie *v.* Hastings, which may be regarded as the leading case on this head of evidence, directly applies. But the transaction with Fleming appears to us not a transaction in his business as a pawnbroker, but was a loan by him, as by any other lender of money, at five per cent. And there is no evidence to show the agency of the shopman in private transactions, unconnected with the business of the shop. I doubted much, at the time, whether it could be received, and intimated such doubt, by reserving

§ 138. Upon this ground it is, that, where an agent is authorized to pay money for work done for his principal, or where he is referred to, to settle and adjust any account or business, his admissions of the existence of the debt, and of its validity, will be sufficient to take the case out of the statute of limitations; for it is connected with, and a part of, the very business of his agency.[1] So, an acknowledgment by an agent authorized to buy goods for his principal, that he has received the goods, will, if made while he is transacting the business, but not otherwise, be good evidence of the delivery of them to him, as against his principal.[2]

§ 139. And not only will the positive acts, representations, declarations, and admissions of an agent, when part of the *res gestæ*, be binding upon the principal; but even his fraudulent or negligent statements, misrepresentations, and concealments will, in many cases, have the same effect.[3] Thus, for example, if an

the point; and now, upon consideration with the court, am satisfied, that it is not admissible. It is dangerous to open the door to declarations of agents, beyond what the cases have already done. The declaration itself is evidence against the principal, not given upon oath; it is made in his absence, when he has no opportunity to set it aside, if incorrectly made, by any observation, or any question put to the agent; and it is brought before the court and jury, frequently, after a long interval of time. It is liable, therefore, to suspicion originally, from carelessness or misapprehension in the original hearer; and again, to further suspicion, from the faithlessness of memory in the reporter, and the facility with which he may give an untrue account. Evidence, therefore, of such a nature, ought always to be kept within the strictest limits to which the cases have confined it; and as that which was admitted in this case, appears to us to exceed those limits, we think there ought to be a new trial." [Burnside *v.* Grand Trunk Railway Co. 47 N. H. 554.]

[1] Burt *v.* Palmer, 5 Esp. 145; Paley on Agency, by Lloyd, 267; Palethorp *v.* Furnish, 2 Esp. 511, n.; Anderson *v.* Sanderson, 2 Stark. 204; s. c. Holt, 591; [Cosgrove *v.* Tebo R. R. Co. 54 Mo. 495].

[2] Biggs *v.* Lawrence, 3 T. R. 454. But see Bauerman *v.* Radenius, 7 T. R. 663, and Betham *v.* Benson, Gow, N. P. C. 45; Drake *v.* Marryatt, 1 B. & Cressw. 473; Clifford *v.* Burton, 1 Bing. 199; Gregory *v.* Parker, 1 Camp. 394; 2 Pothier on Oblig. by Evans, App'x, No. 16, pp. 287, 288; Bingham *v.* Cabot, 3 Dall. 19; Garth *v.* Howard, 8 Bing. 451; New England Mar. Ins. Co. *v.* De Wolf, 8 Pick. 56; Van Renssellaer *v.* Morris, 1 Paige, 13.

[3] [Thus, where an agent of a company procures a subscription of additional stock thereto by fraudulent representations, the fraud can be relied upon as a defence to a suit for unpaid instalments brought by the corporation, and if the stockholder has repudiated the transaction before the bankruptcy of the corporation, in a suit by the assignee. Upton *v.* Tribilcock, 91 U. S. 45. The misrepresentation of the agent, to constitute a valid defence to the claim of his principal, must be in a matter of fact, and not in point of law. Thus, it was held that a letter of three directors of a R. R. Co. to bankers, requesting them to

agent authorized to procure insurance, should conceal from the underwriters a material fact within his own knowledge, it will be equally as potent to invalidate the insurance, as if it were concealed by the principal himself.[1] The reason seems to be, that,

honor checks signed by two directors only, was not a representation that the directors had more than the ordinary authority of railroad directors. Beattie *v.* Lord Ebury, L. R. 7 Ch. 777. But a contract has been held valid where the agent, in making the contract, made what was, in fact, a misrepresentation of a matter known to his principal in another city, but unknown to him, and which was of great importance to the other party. Coddington *v.* Goddard, 16 Gray, 436. See Bennett *v.* Judson, 21 N. Y. 238.

It has, however, been held in England that where A., a principal, knowing that an adjoining house to a tenement which he wished to let, was a house of ill-fame, employs B., an agent, to let the property, without informing him of this circumstance, and B. innocently makes a misrepresentation to C. that there was nothing objectionable about such estate, and thereby induces C. to hire the tenement, the misrepresentation of the agent will not be held to support an allegation of fraud and covin in the principal, since he had made no misrepresentation, not even to his agent, and his agent had made no misrepresentation, since he had no knowledge of any such objection. Cornfoot *v.* Fowke, 6 M. & W. 358. This case has been doubted, and sometimes sharply criticised, Fitzsimmons *v.* Joslin, 21 Vt. 129; National Exchange Co. *v.* Drew, 32 Eng. L. & Eq. 1. In the case of Proudfoot *v.* Montefiore, L. R. 2 Q. B. 511, where the plaintiff procured insurance on his ship which had been in fact lost a few days before the insurance, and the plaintiff's agent knew of the fact and purposely omitted to inform his principal, though he could have done so by telegraph, in order that his principal might insure the vessel, it was held the insurance was invalid. So, where the creditors of an insolvent trader were unwilling to give him further credit, and informed him they did not like to sell to him if he could buy elsewhere, and gave him the name of another merchant, and authorized him to refer to them, and on the strength of this reference the insolvent effected a purchase of goods which the original creditors attached at once, it was held that the owner of goods attached could maintain trover against the sheriff for their value. Fitzsimmons *v.* Joslin, 21 Vt. 129. So, where an auctioneer pretended to have received bids, not actually made, and thus ran up the price of the property from $20,000, the last real bid, to $40,000, at which it was struck off to the plaintiff, who had no knowledge of the fraud, it was held that the owners of the property were bound by this fraud, although they did not direct it, but still claimed to hold the whole $40,000 paid. Veazie *v.* Williams, 8 How. 124. So, where the directors of a joint-stock company, by fraudulent reports of the standing and conditions of the company, induced third persons to contract with the company, and the latter was benefited by the transaction, it was held that the company would be bound by the misrepresentation. National Exchange Co. *v.* Drew, 32 Eng. Law & Eq. 1. See also Burnes *v.* Pennell, 2 House of Lords Cas. 497; Ranger *v.* Gt. Western Railway, 5 House of Lords Cas. 72; Wontner *v.* Sharp, 4 Railway Cas. 542; Reese River Silver Mine Co. *v.* Smith, L. R. 4 H. L. Cas. 64. — ED.]

[1] Marshall on Ins. B. 1, ch. 11, § 1, pp. 466, 467; Stewart *v.* Dunlop,

where one of two innocent persons must suffer, he ought to suffer, who has misled the other into a false confidence in his agent, by clothing him with apparent authority to act and speak in the premises, and who otherwise might receive an injury, for which he might have no adequate redress.

§ 139 *a*. The question has been made in cases of joint agency (not of joint and several agency), how far the acts, or admissions, or representations, or concealment, or negligences of one agent in the common concern, intrusted to them, unknown to the others, will affect their principal. It would seem clear upon principle, that, where the authority given is joint, neither of the agents can act, so as to bind the principal by his act, without the co-operation of all the others in the same act.[1] If, then, the act of one joint agent alone will not bind the principal, upon what ground can his admissions, or representations, or concealments, or negligences have a more conclusive and comprehensive effect? Yet it seems sometimes to have been thought, that, in cases of mere joint agency, the act of one of the several joint agents would bind the principal; and certainly, if that be correct, the conclusion seems irresistible, that the admissions, representations, concealments, and negligences of one of several joint agents ought equally to bind the principal.[2]

§ 140. Upon a similar ground, notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and if he has not, still the principal, having intrusted the agent with the particular business, the other party has a right to deem his acts and

4 Bro. Parl. Cas. 483; Willes *v.* Glover, 4 Bos. & Pull. 14; Shirley *v.* Wilkinson, Doug. 306, n.; Roberts *v.* Fonnereau, Park on Ins. ch. 10, p. 285 (7th ed.); Seaman *v.* Fonnereau, 2 Str. 1183; 3 Chitty on Com. & Manuf. 208, 209; Carpenter *v.* Amer. Ins. Co. 1 Story, 57; Bank of United States *v.* Davis, 2 Hill, 451, 461, 462; Ruggles *v.* Gen. Int. Ins. Co. 4 Mason, 74; s. c. 12 Wheat. 408. [This last case is, however, in Proudfoot *v.* Montefiore, Law Rep. 2 Q. B. 511, denied to be law, and the earlier cases which that case overruled are followed.]

[1] Ante, §§ 42–44.

[2] See Bank of the United States *v.* Davis, 2 Hill, 451, 463, 464, where the doctrine is maintained, that in cases of joint agency, the principal is responsible for the conduct of each and all of his agents, while acting within the limits of the power conferred on them, that is, on all of them jointly. It deserves consideration, whether this doctrine is maintainable except in cases where the power is joint and several. Post, §§ 140, 140 *a*, 140 *b*, and note.

knowledge obligatory upon the principal; otherwise, the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party.[1] But, unless notice of the facts come to the agent, while he is concerned for the principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it, it is not notice thereof to the principal, for otherwise the agent might have forgotten it; and then the principal would be affected by his want of memory, at the time of undertaking the agency.[2] Notice, there-

[1] Fitzherbert *v.* Mather, 1 T. R. 12, 16; Le Neve *v.* Le Neve, 1 Ves. 64–69; Hiern *v.* Mill, 13 Ves. 114; Id. 120; 3 Chitty on Com. & Manuf. 208, 209; 1 Story on Eq. Jurisp. § 408; Astor *v.* Wells, 4 Wheat. 466; 2 Liverm. on Agency, pp. 235–238 (ed. 1818); Cowen *v.* Simpson, 1 Esp. 290; Toulmin *v.* Steere, 3 Meriv. 210; Smith on Merc. Law, 67 (2d ed.); Id. ch. 5, § 4, p. 123 (3d ed. 1843); Berkeley *v.* Watling, 7 Adolph. & Ellis, 29; Fulton Bank *v.* New York & Sharon Canal Co. 4 Paige, 127, 136, 137; Bank of United States *v.* Davis, 2 Hill, 451, 461, 464; [Sheldon *v.* Cox, Ambl. 624].

[2] Hiern *v.* Mill, 13 Ves. 120; 1 Story on Eq. Jurisp. § 408; Hargreaves *v.* Rothwell, 1 Keen, 159; Bracken *v.* Miller, 4 Watts & Serg. 102; Hood *v.* Fahnestock, 8 Watts, 489, 490; Lawrence *v.* Tucker, 7 Greenl. 195. [Thus, where one tenant in common acts for the others in the care and charge of premises held in common, his knowledge will be attributed to his co-tenants. Ward *v.* Warren, 82 N. Y. 265. So, where A., as attorney for B., procured a judgment by default in favor of the latter against C., it was held that A.'s knowledge of C.'s intent to commit a fraud under the bankrupt law was imputable to B. Rogers *v.* Palmer, 102 U. S. 263. So, notice to a selling agent of a former dealer with a firm, that one of the partners had retired therefrom, was held to be notice to his principal, although he neglected to inform him of the fact. Hier *v.* Odell, 18 Hun, 314. So, a solicitor, who prepared the deeds on behalf of the mortgagor and mortgagee, was held to have notice of that incumbrance on taking a subsequent mortgage of the same property to himself. Kennedy *v.* Green, 3 My. & K. 699; Perkins *v.* Bradley, 1 Hare, 219. It has been held, also, that the question when it is sought to affect a purchaser with constructive notice of an incumbrance upon real estate, is not whether he had the means of obtaining, and might by prudence have obtained the knowledge, but whether the not obtaining it was gross negligence on his part or on the part of his agent. Ware *v.* Egmont, 4 De G. M. & G. 460. So, notice to an agent of the price of wheat sold to the defendant was sufficient to bind the defendant, Owens *v.* Roberts, 36 Wisc. 258: so, notice of non-payment of check given to agent, Farmer *v.* Willard, 71 N. C. 284. So, where an agent, negotiating a sale of liquors, knows that the purchaser intends to use them in violation of law, such knowledge is notice to the principal. Suit *v.* Woodhall, 113 Mass. 391; The Distilled Spirits, 11 Wall. 356. So, the knowledge of a servant, who has charge of a dog, that he has a vicious disposition, was held to be the knowledge of his master. Baldwin *v.* Casella, L. R. 7 Ex. 325. Nor can a contract made by an agent on the Lord's Day be enforced by the principal. Smith *v.* Sparrow, 4 Bing. 84; Moseley *v.* Hatch, 108 Mass. 517. See also Sooy *v.* State, 41 N. J. L. 394; Houseman *v.* Girard Ass., 81 Pa. St. 256; Chouteau

fore, to the agent, before the agency is begun or after it has terminated, will not, ordinarily, affect the principal.[1]

§ 140 *a*. We have already had occasion to consider how far, in cases of joint agency, the act, admission, representation, or concealment of one, without the knowledge or assent of the others, would or ought to bind the principal. Probably, the same rule

v. Allen, 70 Mo. 290; Boyd *v*. Vanderkemp, 1 Barbour (Ch.), 287; Fuller *v*. Bennett, 2 Hare, 402; Day *v*. Walmsley, 33 Ind. 145; Stanley *v*. Chamberlain, 39 N. J. L. 565; Congar *v*. Chicago, &c. R. Co., 24 Wisc. 157; Pierce *v*. Chicago, &c. Co., 36 Wisc. 283. But notice to an auctioneer of the pendency of a suit against his principal respecting the property to be sold by him is not notice to the principal. Hinton *v*. Citizens' Ins. Co., 63 Ala. 488. Nor is a wife chargeable with her husband's knowledge of the existence of mortgages upon real estate bought by her. Pringle *v*. Dunn, 37 Wisc. 449. And where a money demand was given by its owner to a collection agency with instructions to collect the same, and it was placed in the hands of an attorney, who, knowing the insolvency of the debtor, persuaded him to confess judgment, and the money was collected, it was held that the attorney's knowledge was not imputable to the owner of the claim so as to render him liable to the assignee in bankruptcy of the debtor for money collected on the judgment. Hoover *v*. Wise, 91 U. S. 308. See also Greentree *v*. Rosenstock, 61 N. Y. 583; Farrington *v*. Woodward, 82 Pa. St. 259; Tagg *v*. Tenn. Nat. Bank, 9 Heisk. 479. Nor is notice to a depot agent of an assignment of a chose in action notice to the railroad company. Lambreth *v*. Clarke, 10 Heisk. 32. See also Hovey *v*. Blanchard, 13 N. H. 145; Sutton *v*. Dillaye, 3 Barb. 529; Ross *v*. Houston, 25 Miss. 591; Adams Ex. Co. *v*. Trego, 35 Md. 47. — Ed.]

[1] [But the more recent, and as now regarded the more salutary rule of law, especially in England, in regard to knowledge of a fact by the agent, affecting the interest of the principal on whose behalf he acts, is thus laid down in the Exchequer Chamber by Pollock, C. B., in the case of Dupee *v*. Norwood, 10 Jur. N. S. 851; S. C. 17 C. B. N. S. 466; S. C. in C. B. 14 C. B. N. S. 574: "In a commercial transaction, if the purchaser's agent on behalf of the principal buy goods from a factor, and such agent at the time has notice, no matter by what means, that the goods are not the goods of the factor, the knowledge of the agent must be held to be the knowledge of the principal." The same rule was extended in a recent case in Vermont to the knowledge of a trust acquired by the agent before his employment to levy upon the goods as the property of the trustee, and the court held that the principal was affected by the knowledge of the agent in regard to the true state of the title. Hart *v*. The F. & M. Bank, 33 Vt. 252. See also Blumenthal *v*. Brainerd, 38 Vt. 410; Hayward *v*. Nat. Ins. Co., 52 Mo. 181. But both these cases go upon the ground that the knowledge of the agent, in order to affect his principal, must have been in the mind of the agent at the time of the transaction on behalf of his principal, else he would be liable to be affected by a notice he has no means of coming at, and might thus be placed in the very embarrassing condition of never being able to hear from his agent precisely what facts he would be regarded as having knowledge of. With this qualification, the rule above stated is certainly a very salutary one. Dresser *v*. Norwood, 17 C. B. N. S. 466; Ante, §§ 42, 139 *a*. — R.]

would be held applicable to notice in cases of joint agency. In cases of corporations, who act through the instrumentality of agents, the same rule, as to notice, would seem properly to apply to their regular agents, as applies to the agents of a mere private person.[1] But a nice question may arise, in cases where corporations act through the instrumentality of a board of directors or trustees, or other official agents, how far notice to one of the directors, or trustees, or other official agents, is to be deemed notice to all, and binding upon the corporation. Thus, for example, suppose, in the case of a bank, one of the directors should have notice that a note offered for discount was invalid or void, from extrinsic facts, unknown to the other directors, and he should conceal those facts, and the note should be discounted by the board; the question would arise, whether notice to one director, and unknown to the others, was notice to, and obligatory upon, the corporation, so as to let in the proof as a defence against a suit on the note for non-payment. Upon this question, it is not easy to affirm what is the prevailing rule, since the authorities are not entirely agreed. On the one hand, it has been thought reasonable, that nothing but an official notice of

[1] [Thus, where an agent of an insurance company who issues an insurance policy knows at the time of outstanding incumbrances on the property which are omitted from the application, the company will be bound by his knowledge. Harriman *v.* Queen's Ins. Co., 49 Wisc. 71. But where a policy has been issued and delivered by a regular agent of an insurance company, it was held that the company was not chargeable with the knowledge subsequently acquired by the agent who placed the insurance in the company. Crane *v.* City Ins. Co., 14 Am. L. Rev. 804; Ben. Franklin Ins. Co. *v.* Weary, 4 Ill. App. 74. And where a party was in possession of a house, under an executory contract for the purchase thereof, and applied to the agent of insurance company for a policy, stating to him the nature of his interest, but the agent failed to make the same known to his principal, and it was not stated in the policy, it was held, that the company was estopped by the knowledge of its agent from setting up the breach of condition of the policy. Miaghan *v.* Hartford Ins. Co., 24 Hun, 59; Grace *v.* Am. Central Ins. Co., 16 Blatch. C. C. 433. But knowledge by a janitor of a school-house, appointed by a school-committee, that a coal-hole in front of the school-house is uncovered, is not notice to the city of a defect in the highway. Foster *v.* Boston, 127 Mass. 290. And where the president of a gas company sold to the company, in his private capacity, real estate, it was held, that his knowledge as an attorney of a defect in the title was not imputable to the company. Barnes *v.* Trenton Gas Light Co., 27 N. J. Eq. 33. But it was held that notice to the president of a bank that stock standing upon the books of the bank in the name of one person is held by him in trust for another, must be considered as notice to the corporation. Porter *v.* Bank of Rutland, 19 Vt. 410. So, the knowledge of an agent of a railroad company of a vendor's lien upon railway ties was held binding upon the company. Slater *v.* Irwin, 38 Iowa, 261. — Ed.]

the facts to the board, or to the majority of the board, acting as such in the particular discount, ought to bind the bank.[1] On the other hand, it has been insisted, that notice of the facts to any one of the directors, who acts in the discount (but not unless he acts), is sufficient to bind the corporation, although the other directors at the board had no knowledge thereof.[2]

§ 140 *b*. If we examine the subject upon general principles, and with reference to practical convenience in the administration of banks, it might seem, that, to bind the bank, the notice ought to be given to the proper agents of the bank, legally intrusted with the particular business, to which the notice relates. If the business be legally confided to the cashier, notice to him ought to bind the bank.[3] If it is to be done by a board of directors, as, for example, in the discounting of notes, they ought to have official notice of any illegality or informality affecting the notes. And notice to one director only, unknown to the others of the board, ought not to bind the bank.[4] But in one of the authorities, a dis-

[1] See Louisiana State Bank *v.* Senecal, 13 La. 525, 527; Housatonic & Lee Bank *v.* Martin, 1 Met. 294, 308; Commercial Bank *v.* Cunningham, 24 Pick. 274, 276. On this occasion, the court said: "The knowledge of Parker, although he was one of the directors of the Commercial Bank, is no proof of notice to that corporation, especially as he was a party to all these contracts, whose interest might be opposed to that of the corporation. To admit the stockholders or directors of a bank to subject it to liability, or to affect its interests, unless they have authority so to do expressly by its charter, would be attended with the most dangerous consequences, and is certainly not sanctioned by any authority. Hallowell & Augusta Bank *v.* Hamlin, 14 Mass. 180."

[2] Bank of United States *v.* Davis, 2 Hill, 451; North River Bank *v.* Aymar, 3 Hill, 262, 274, 275.

[3] [C., who was at the same time treasurer of a town and cashier of a bank, took $3,000 from the funds of the bank, for his own use, and executed a note to the bank for the amount, as treasurer of the town, the note being entered upon the books of the bank, in the same manner with other notes taken for money loaned. C. was the principal financial manager of the bank, and had been allowed and accustomed to make loans, at his discretion, without consulting the directors. He had already, without their knowledge, embezzled the funds of the bank to a large amount. The town had been in the habit of borrowing money at this bank and elsewhere, and upon notes executed by the town treasurer. In a suit by the bank against the town upon the note, it was held, that C.'s fraud, as treasurer, was known to him as agent of the bank, and was therefore the knowledge of the bank, and that the bank could not recover. Bank of New Milford *v.* Town of New Milford, 36 Conn. 93; Willard *v.* Buckingham, 36 Conn. 395. — G.]

[4] Louisiana State Bank *v.* Senecal, 13 La. 525, 527. See also National Bank *v.* Norton, 1 Hill, 572–578; Bank of United States *v.* Davis, 2 Hill, 451, 463; Fulton Bank *v.* New York & Sharon Canal Co. 4 Paige, 127, 136, 137.

tinction is taken between notice given to a director privately, and notice given to him officially, for the purpose of being communicated to the board, although it should not be communicated to the board. In the latter case it is said, that the bank is bound by the notice to the one director only, although it may not be in the former.[1] In another case a distinction is taken between notice to a director, who acts at the board in discounting a note, of whose illegality or infirmity he alone has notice, and not the board, and notice to a director, who does not act at the time of the discount at the board. In the former case, it is said, that the bank is bound; in the latter, it is not.[2] Perhaps it will be found, that, if either of

[1] National Bank *v.* Norton, 1 Hill, 575, 578; Fulton Bank *v.* New York & Sharon Canal Co. 4 Paige, 127, 129. [Where a director, who acted in discounting a note for the bank, knew of fraud in its inception, his knowledge was held to be notice to the bank, and the bank could not sue on the note, Nat. Security Bank *v.* Cushman, 121 Mass. 490: but where a director gains information regarding matters in which the bank is interested, outside of his office as such director, and as a "business man only," such knowledge is not held to be that of the bank, Atlantic Bank *v.* Savery, 82 N. Y. 291; West Boston Savings Bank *v.* Thompson, 124 Mass. 506: and where a bank bought a note upon the representations of an attorney who knew that it was not the personal property of the holder, but that he held it in trust, the bank was held to be presumed to know what it could so easily have ascertained, Smith *v.* Ayer, 101 U. S. 329. — Ed.]

[2] Bank of United States *v.* Davis, 2 Hill, 451, 464; North River Bank *v.* Aymar, 3 Hill, 262, 274, 275. In the case of Bank of United States *v.* Davis, 2 Hill, 451, 463, Mr. Chief Justice Nelson, in delivering the opinion of the court, said: "I agree, that notice to a director, or knowledge derived by him, while not engaged officially in the business of the bank, cannot and should not operate to the prejudice of the latter. This is clear, from the ground and reason upon which the doctrine of notice to the principal, through the agent, rests. The principal is chargeable with this knowledge for the reason that the agent is substituted in his place, and represents him in the particular transaction; and as this relation, strictly speaking, exists only while the agent is acting in the business thus delegated to him, it is proper to limit it to such occasions. But in this case, as has been already observed, Williams was a member of the board, participating at the time in the discounting of bills and notes as one of the directors of the bank; and as such procured the discount of the paper in question avowedly for his own benefit, but knowing at the time that it belonged to Davis, one of the defendants. So far, therefore, as he may be regarded as representing the bank in transacting its business at the board, the institution must be considered as having knowledge of the fraudulent perversion of the bills from the object for which they were drawn. To this extent, his acts and knowledge concerning the object and ownership of the paper, are to be deemed the acts and knowledge of the institution itself. It is said, however, that Williams was but one of the five empowered by the bank to represent it in this transaction; that the bank is not therefore to be held responsible for his individual fraud at the time, nor can it be chargeable with his knowledge of the

these distinctions is to prevail, it will sap the foundations, on which the security of all banking and other moneyed corporations, if not of

facts, under which the paper in question was discounted; and that such knowledge is chargeable only when the agent has full power to act for the principal in the particular case. It is not to be denied, that if a principal employs several agents to transact jointly a particular piece of business, he is equally responsible for the conduct of each and all of them while acting within the limit and scope of their power, as completely so as he would be for the conduct of a single agent upon whom the whole authority has been conferred. He cannot shift or avoid this responsibility by the multiplication of his agents. It is also clear, that the corresponding responsibility of each of the several joint agents to the principal for the faithful discharge of their duties, is as complete and perfect as in the case of a single agency; and any prejudice to the principal, arising from fraud, misconduct, or negligence of either of them, would afford ground for redress from the party guilty of the wrong. These are general conceded principles, for which no authority need be cited. One of the grounds for charging the principal with the knowledge possessed by the agent is, because the latter is bound to communicate the fact to the former, and is liable for any prejudice that may arise from a neglect in this respect; and hence the law presumes that the principal has had actual notice. Now the duty of any one of the joint agents is as obligatory on him in this respect, as if he had possessed the sole power in the matter of the agency, and any prejudice resulting from the neglect would afford a like redress. Again, so completely is the principal represented by the agent while acting within the scope of his authority and employment, that the third party, for most purposes, is considered as dealing with the principal himself. In the case of a contract, it is deemed the contract of the principal, and if the agent at the time of the contract make any representation or declaration touching the subject-matter, it is the representation and declaration of the principal. Sandford *v.* Handy, 23 Wend. 260, and cases there cited. Upon these views it seems to me consistently and reasonably to follow, that in case of a joint agency by several persons, — as of the directors of a bank, — notice to any one, or the acts of any one, while engaged in the business of the principal, is notice to the bank itself. The corporation is acting and speaking through the several directors, who jointly represent it in the particular transaction. In judgment of law it is present, conducting the business of the institution itself; the acts of the several directors are the acts of the bank; their knowledge, the knowledge of the bank; and notice to them, notice to the bank." In North River Bank *v.* Aymar, 3 Hill, 262, 274, the Supreme Court of New York recognized the authority of this case. In Fulton Bank *v.* New York and Sharon Canal Co. 4 Paige, 127, 136, 137, Mr. Chancellor Walworth said: "There can be no actual notice to a corporation aggregate, except through its agents or officers. The directors or trustees, when assembled as a board, are the general agents, upon whom a notice may be served; and which will be binding upon their successors and the corporation. But notice to an individual director, who has no duty to perform in relation to such notice, cannot be considered a notice to the corporation. The notice, which Brown and Cheeseborough had of what took place at the house of the former, on the evening of the 7th of September, was not of itself legal notice to the bank that the fund was placed under the control of the finance committee; and that Brown, although he left his signature, and apparently had the control of the money the

all corporations, have been hitherto supposed to rest; to wit, that no act, or representation, or knowledge of any agent thereof, unless officially done, made, or acquired, is to be deemed the act, representation, or knowledge of the corporation itself. If it is once promulgated, that the mere private knowledge of any director of a bank, or of any member of an official board, is binding upon the bank, although unknown to the other members of the board, whenever he acts officially at the board, or whenever it is his duty to communicate that knowledge to the board, it will be found difficult to circumscribe the doctrine practically within any bounds short of binding the corporation in all cases, where any director has such private knowl-

next morning, was not in fact authorized to draw it from the bank. But if Cheeseborough had been authorized by the bank, as their president and agent, to agree to receive the money on deposit, the agreement made with him as such agent, would have been notice to the corporation; although he neglected to communicate the facts to the other officers of the bank, or to the board of directors. It is well settled, that notice to an agent of a party, whose duty it is, as such agent, to act upon the notice, or to communicate the information to his principal, in the proper discharge of his trust as such agent, is legal notice to the principal. And this rule applies to the agents of corporations as well as others." On the other hand, in Louisiana State Bank *v.* Senecal, 18 La. 525, 527, Mr. Justice Rost, in delivering the opinion of the court, said: "It was proved at the trial, that the note was given in payment of land sold by Mrs. Peychaud, and was delivered to her husband, Anatole Peychaud, who had signed with her the deed of sale. That deed contains a clause, that the note, upon which this action was brought, shall not be negotiated, nor the payment thereof exacted, until the property sold shall be fully released from all liabilities résulting, or to result, from certain general mortgages then existing upon it. Peychaud, being at that time a director of the Louisiana State Bank, offered the note for discount, before the mortgages were raised; was present at the board when it was acted upon; took no part in the discount of it, and gave no information to the board in relation to the restrictions contained in the act of sale. The note was discounted for his benefit, and the defendant now contends, that he was the agent of the bank, and that the knowledge of the agent being the knowledge of the principal, the plaintiffs are to be considered as having received notice, and ought not to recover. If the knowledge of those facts had been brought home to the president or cashier, we would unhesitatingly say, that the plaintiffs were bound by it, they being the executive officers of the bank, upon whom all notices and process may be served. But directors are not officers of the bank, in the proper sense of the word, nor have they individually any power or control in the management of its concerns. They act collectively, and at stated times, and have otherwise no more to do with the general management of the institution than the other stockholders. The director, in this instance, had a direct interest in suppressing the information he possessed; and it would be extending constructive notices beyond all reasonable bounds to say, that the plaintiffs must be held cognizant of facts which are proved to have been intentionally concealed from them, by a person who, individually, was neither their officer nor their agent."

edge. It may, perhaps, be correctly said, that, in all cases, it is the duty of every director to communicate all facts within his knowledge or notice, which are material to the interests of the bank. Whenever, therefore, the question shall again directly arise in judgment, it will well deserve the profound consideration of those who shall be called upon to decide it, what, in a conflict of authority, ought, upon principle, to be the true rule to govern, with reference to the rights, and claims, and securities, not only of the members of corporations, but also of the public at large dealing with corporations. It may here be said in respect to both, "Una salus, ambobus periculum."

§ 140 *c*. If notice to any director be notice to the corporation, although never communicated to the other proper functionaries of the corporation, notice by any director ought equally to prevail, in favor of the corporation, although not authorized by any act of the appropriate board superintending its concerns. Questions may easily be put upon this subject, which would involve considerations of a very delicate and important nature. Would notice to a single director of a bank, of the dishonor of a bill or note indorsed by or on behalf of the bank, be notice to bind the bank, although the other directors never had any knowledge thereof? Would notice of the dishonor of a bill or note indorsed to, and held by the bank, given by one of the directors, be good to bind the indorsers, although unknown to the board of directors, and never adopted by it? Would a bank, holding bills or notes indorsed to it by one of its directors, be affected with all infirmities, or illegalities, or frauds, which might attach to it in his own hands upon the notion of constructive notice thereof? Would a mortgage made to a bank by one of its directors, or by a third person, be affected by prior unregistered incumbrances or other equities, attaching to it, which were known at the time to such directors? Would a mortgagor be permitted to avoid a mortgage given by him to the bank, for a valuable consideration, without notice by the board of directors of any defect in the title, merely because one of the directors had, at the time, secret knowledge of facts which would avoid it? These questions are put merely to show the extent to which the doctrine of constructive notice may be carried in regard to corporations which are compellable, by their charters, to act through the instrumentality of a board of directors.

§ 140 *d*. On the other hand, notice of facts to the principal is

ordinarily notice thereof to the agent; for it is the duty of the principal to communicate to his agent notice of the facts which come to his knowledge, touching the matter of the agency; and if the principal suffers any loss or injury by want of such notice, he suffers by his own fault; and if the other party is injured thereby, he ought to have correspondent redress.[1] The law, therefore, imputes the knowledge of the principal to be the knowledge of the agent, either upon the presumption, that the principal has done his duty, or to avoid all circuity and difficulty, as to the mode and extent of the remedy.

§ 141. We have already had occasion to remark, that, although the powers of agents are, ordinarily, limited to particular acts; yet, that extraordinary emergencies may arise, in which a person, who is an agent, may, from the very necessities of the case, be justified in assuming extraordinary powers; and that his acts, fairly done, under such circumstances, will be binding upon his principal.[2] Thus, for example, a factor will be justified in deviating from his orders directing him to sell at a stipulated price, if the goods are of a perishable nature, and the sale is indispensable to prevent a total loss, or a greater loss.[3] The master of a ship acquires in the same way, as we have seen, a superinduced authority over the cargo of the ship in cases of necessity, which does not belong to his ordinary agency.[4] Upon the same ground, perhaps, an agent, not generally authorized to insure, might, in unforeseen exigencies, to prevent an irreparable loss to his principal, acquire a right to insure for his principal.[5] So an agent, who is directed by his principal to place his funds in a certain place, may be justified or excused in sending them to another place, if there be reasonable ground of alarm and danger, which prevents him from obeying his orders.[6]

[1] Mayhew *v.* Eames, 3 B. & Cressw. 601; Willis *v.* Bank of England, 4 Adolph. & Ellis, 21, 89.

[2] Ante, § 85; Post, §§ 118, 193, 194, 237; 2 Kent, Comm. Lect. 41, p. 614 (4th ed.); 3 Chitty on Com. & Manuf. 218; Liotard *v.* Graves, 3 Caines, 226; Lawler *v.* Keaquick, 1 John. Cas. 174; Drummond *v.* Wood, 2 Caines, 310; Forrestier *v.* Bordman, 1 Story, 43; [Wood *v.* Cooper, 2 Tenn. 441; Harter *v.* Blanchard, 64 Barb. (N. Y.) 617].

[3] 3 Chitty on Com. & Manuf. 218; 1 Comyn on Contr. 236. But see Anon. 2 Mod. 100; Story on Bailm. § 455; Ante, § 85; Chapman *v.* Morton, 11 Mees. & Wels. 534.

[4] Ante, §§ 85, 118; The Gratitudine, 3 Rob. 255–258.

[5] See Wolf *v.* Horncastle, 1 Bos. & Pull. 323.

[6] Perez *v.* Miranda, 19 Martin, 494. [But where a consignee does not re-

§ 142. The same doctrine would seem to apply to the case of a mere stranger, acting for the principal without any authority, under circumstances of positive necessity; as, for example, in the case of a stranger interfering to prevent irreparable injury to perishable property, occasioned by fire, shipwreck, inundation, or other casualties, or found without any known owner or agent, in order to its due protection or preservation.[1] In such cases, he performs the functions of the *negotiorum gestor* of the civil law; and seems justified in doing what is indispensable for the preservation of the property, or to prevent its total destruction.[2] Salvors, on land, equally with those at sea, in cases of this sort, are understood to be clothed with authority to dispose of the property saved for the interests of all concerned, if it be of a perishable nature, or unfit to await the regular determination of a court of justice.[3]

§ 143. Cases bearing a strong analogy have also come under the cognizance of courts of equity. Thus, for example, where a foreign factor deviated from his orders, as to the price of goods to be shipped by him to his principal; and the goods arrived; and the principal refused to receive them; the question arose, whether the principal was bound to return them, at all events to the factor, by a reshipment; or, whether he was at liberty to act as an agent from necessity, for the benefit of the original factor; and, whether, if it was for the interest of the latter, he might sell them on the spot; and it was thought that he might. And, even supposing that at law, under such circumstances, the principal would not be protected in such a sale, a court of equity would deal with it as a matter of equitable agency.[4]

side at the point where goods are to be delivered, a carrier was held not to be authorized to deliver them to the general agent of consignor, who lived there. Wilson Sewing Machine Co. *v.* Louisville R. R. Co., 71 Mo. 203. —Ed.]

[1] Story on Bailm. § 83.

[2] Story on Bailm. § 189; Dig. Lib. 3, tit. 5, l. 10, § 1; Id. l. 45; Pothier, Pand. Lib. 3, tit. 5, n. 1–14; Pothier, App'x, *Du Quasi Contrat Negot. Gestorum;* 1 Pothier on Oblig. n. 113–115; 2 Kent, Comm. Lect. 41, p. 616 (4th ed.); Ersk. Inst. B. 3, tit. 3, § 52; 1 Stair, Inst. B. 1, tit. 8, §§ 3–6, by Brodie.

[3] Story on Bailm. §§ 83, 83 *a*, 84, 121 *a*, 189, 189 *a*, 190, 621 *a*, 622–625.

[4] Kemp *v.* Pryor, 7 Ves. jr. 240; Cornwall *v.* Wilson, 1 Ves. 509; Smith on Merc. Law, 52, 53 (2d ed.); Id. ch. 5, § 2, p. 99 (3d ed. 1843). Lord Eldon, on one occasion, said: "But I doubt, whether it may not be held, and whether it has not been held, by special juries before me, that in such a case as this, of goods exported, and where the person receiving them abroad cannot return them, the vendee is authorized to sell them for the benefit of the vendor, and

may hold him liable in an action for damages, to the amount of the difference; giving him the benefit of the sale in the foreign market." Again: "I go upon these particular circumstances: that, where there is a contract of sale and delivery, and the goods might, from the nature of the contract, be re-delivered; if under the circumstances they cannot be re-delivered, an equity arises from this, that the party cannot protect himself at law, as he cannot re-deliver; and he was led into that by the misrepresentation of the other. The vendee, therefore, has a right to the extent of his loss; the vendor to an account of the sales in the foreign market; and whether the most was made of them; which can only be made out by an account under the particular circumstances." Again: "I have a strong conviction, upon sound principles, confirmed by my short experience at Guildhall, that, if a man under a contract to supply one article, supplies another, under such circumstances that the party to whom it is supplied must remain in utter ignorance of the change, until the goods are under circumstances in which it would be against the interest of the other to return or reject them, instead of doing what is best for him, selling them immediately, a jury would have no hesitation in saying, he ought to be considered, if he pleased, not as a purchaser, but as placed by the vendor in a situation, in which, acting prudently for him, he was an agent. The consequence, then, is, that he would be liable to account for the money received, subject to freight and other charges; though, while the goods were *in transitu*, he had considered himself owner." Kemp *v.* Pryor, 7 Ves. jr. 240–242, 247. See also Cornwall *v.* Wilson, 1 Ves. 509, where the same doctrine is affirmed by Lord Hardwicke, who said: "But, though I could incline to that, yet the present case turns on the latter part of the transaction, what defendant himself has done by taking these goods to himself, treating them as his own, not as factor for plaintiffs, as he would have himself considered by the custom of merchants; as to which it is sworn (and it is very true and reasonable), that a merchant here, refusing the goods sent over by his factor in a foreign country, who exceeded the authority, having advanced and paid his money on these goods, may be considered as having an interest in the goods as a pledge, and may act thereon as a factor for that person, who broke his orders, and may therefore insure these goods, as he has done; which might be reasonable, as it was

CHAPTER VII.

DUTIES AND OBLIGATIONS OF AGENTS IN EXECUTING AUTHORITY.

§ 144. Let us, in the next place, proceed to the consideration of the duties, obligations, and responsibilities of agents. The latter, so far as their principals are concerned, naturally grow out of the former. So far as third persons are concerned, they may, in some measure, depend upon, or arise from, collateral inquiries.

§ 145. And first, in relation to the duties and obligations of agents to their principals. These may admit of various considerations: (1.) What is the proper mode of executing their authority; and what will be held a good execution thereof. (2.) What is the degree of diligence required of agents, in the proper exercise of their functions. (3.) What are the other incidental acts, which are required of them by law, in order to fulfil their duties and obligations.

§ 146. First. As to the proper mode of execution of their authority by agents. We have already seen that an agent cannot ordinarily delegate his authority, and, consequently, the act must be done by him in person, as it is a matter of personal confidence.[1] Hence it follows, that if he is authorized to make a contract for his principal in writing, it must, in general, be personally signed by him, and it cannot be signed by his clerk, either in his own name, as agent, or in the name of the principal, so as to bind the latter.[2] We have also already seen how a joint authority is to be executed; and therefore it is unnecessary to recur to that subject in this place.[3]

§ 147. But a most material consideration is, as to the particular form in which the agent, when he acts personally, is to execute the

[1] Ante, §§ 13, 14; Coles *v.* Trecothick, 9 Ves. 236, 251, 252; Henderson *v.* Barnwall, 1 Y. & Jerv. 387; Solly *v.* Rathbone, 2 M. & Selw. 298; Catlin *v.* Bell, 4 Camp. 184; Combe's case, 9 Co. R. 75, 76; *Ex parte* Sutton, 2 Cox, 84.

[2] Coles *v.* Trecothick, 9 Ves. 235, 251, 252; Blore *v.* Sutton, 3 Meriv. 237; Henderson *v.* Barnwall, 1 Y. & Jerv. 387. But see *Ex parte* Sutton, 2 Cox, 84.

[3] Ante, §§ 42, 44; Com. Dig. *Attorney*, C. 11.

authority, so as to bind his principal. And as to this, the rule usually laid down in cases of written contracts (subject, however, to the qualifications and exceptions hereafter stated),[1] is, that in order to bind the principal, and to make it his contract, the instrument must purport on its face to be the contract of the principal, and his name must be inserted in it, and signed to it, and not merely the name of the agent, even though the latter be described as agent in the instrument; or at least the terms of the instrument should clearly show, that the principal is intended to be positively bound thereby, and that the agent acts plainly as his agent in executing it.[2] Indeed, the rule has been laid down in broader terms; and it has been said

[1] Post, §§ 161, 162, 269, 270.

[2] Stackpole *v.* Arnold, 11 Mass. 27, 29. Mr. Justice Parker, in delivering the opinion of the court in this case, said: "It might be sufficient for the decision of this cause to state that no person, in making a contract, is considered to be the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument which he signs. This principle has been long settled, and has been frequently recognized; nor do I know of an instance in the books of an attempt to charge a person as the maker of any written contract, appearing to be signed by another, unless the signer professed to act by procuration or authority, and stated the name of the principal, on whose behalf he gave his signature. It is also held, that whatever authority the signer may have to bind another, if he does not sign as agent or attorney, he binds himself and no other person." The same doctrine was affirmed in Bradlee *v.* Boston Glass Manufactory, 16 Pick. 347, 350. See also Arfridson *v.* Ladd, 12 Mass. 173–175; Savage *v.* Rix, 9 N. H. 263, 269, 270; Rice *v.* Gove, 22 Pick. 158, 161; Minard *v.* Reed, 7 Wend. 68; Pentz *v.* Stanton, 10 Wend. 271; Spencer *v.* Field, 10 Wend. 87. We shall presently see that the doctrine here stated, if maintainable at all in respect to contracts not under seal, must be received with many qualifications and limitations. It seems directly opposed to the decision in Higgins *v.* Senior, 8 Mees. & Wels. 834, 844, and many other well-considered authorities. See Post, §§ 154, 155, 160, 160 *a*, 161, 162, 269, 270, 275, 276, 391–400; Taintor *v.* Prendergast, 3 Hill, 72; Post, § 268. Indeed, in the case of the New England Mar. Ins. Co. *v.* De Wolf, 8 Pick. 56, 61, Mr. Chief Justice Parker laid down the doctrine in a manner which qualifies the conclusion from the general language of the case of Stackpole *v.* Arnold, 11 Mass. 27, 29, restraining it to cases of sealed instruments. He there said: "If Clapp had authority to make the guarantee for the defendant, and the words are such as not clearly to bind himself alone, and it can be ascertained that he intended to act for De Wolf, the latter will be bound. The authorities cited to maintain the position, that the name of the principal must be signed by the agent, are of deeds only, instruments under seal; and it is not desirable that the rigid doctrine of the common law should be extended to mercantile transactions of this nature, which are usually managed with more attention to the substance than to the form of contracts." See also Andrews *v.* Estes, 2 Fairf. 267, where the rule in Combe's case is affirmed to apply only to contracts under seal. 2 Kent. Comm. Lect. 41, p. 631, note (*a*) (4th ed.); Post, §§ 160, 161. See also Daniells *v.* Burnham, 2 La. 243; American Jurist

to be an ancient rule of the law, that, when any one has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and, therefore, the attorney cannot do it in his own name, nor as his proper act; but in the name and as the act of him who gives the authority.[1]

for Jan. 1830, vol. 3, pp. 78, 79; Post, §§ 269, 270; Stetson *v.* Patten, 2 Greenl. 358; [Bedford Com'l Ins. Co., *v.* Covell, 8 Met. 442; but see Lindus *v.* Bradwell, 5 C. B. 583: and the rule is well settled in Massachusetts, as applied to bills of exchange and promissory notes, Bank of Brit. No. America *v.* Hooper, 5 Gray, 567; Slosson *v.* Loring, 5 Allen, 340; Draper *v.* Mass. Steam Heating Co., Ibid. 338; Brown *v.* Parker, 7 Allen, 337; and see Stanton *v.* Camp, 4 Barb. 274; Taber *v.* Cannon, 8 Met. 456; Dyer *v.* Burnham, 35 Me. 10; Burnham *v.* Williams, 7 Q. B. 103: and it is not necessary to the validity of a notice to quit, given by the general agent of a landlord to a tenant, that the agency should appear on the notice. Jones *v.* Phipps, L. R. 3 Q. B. 567. — R.].

[1] Combe's case, 9 Co. R. 75, 77; Com. Dig. *Attorney*, C. 14; 2 Kent, Comm. Lect. 41, pp. 629–631 (4th ed.); Clark *v.* Courtney, 5 Pet. 319, 349, 350; Shack *v.* Anthony, 1 M. & Selw. 573; Parker *v.* Kett, 1 Salk. 95; s. c. 2 Mod. 466; Lynch *v.* Postlethwaite, 7 Miller (La.), 293; New England Mar. Ins. Co. *v.* De Wolf, 8 Pick. 56, 61; Andrews *v.* Estes, 2 Fairf. 267; Abbott on Shipp. Pt. 2, ch. 2, § 5 (ed. 1829); Id. Pt. 3, ch. 1, § 2; Harper *v.* Hampton, 1 Harr. & John. 622; American Jurist for January, 1830, vol. 3, pp. 52–86; Wilks *v.* Back, 2 East, 142; Stinchfield *v.* Little, 1 Greenl. 231; Elwell *v.* Shaw, 1 Greenl. 339; Heffernan *v.* Addams, 7 Watts, 121; Mears *v.* Morrison, 1 Breese (Ill.), 172; Sheldon *v.* Dunlap, 1 Harr. (N. J.) 245. [It has therefore sometimes been thought not a sufficient execution for an agent to sign merely his principal's name, as if it were his own personal act, but that he ought to add some words indicating that the signature was signed by an agent and not by the principal. The propriety of such a mode of execution may be easily seen, but it cannot positively be said, upon the authorities, to be absolutely necessary to the validity of the instrument. Forsyth *v.* Day, 41 Me. 382; Hunter *v.* Giddings, 97 Mass. 41. In Wood *v.* Goodridge, 6 Cush. 120, Fletcher, J., said: "The first question, as to the plaintiff's title to the land, is, whether the form of executing the mortgage and note by the attorney was a legal execution of his power as such; whether signing the name of the principal, Benjamin Goodridge, as if it were his own personal act and signature (it not appearing upon the instruments to be done by Levi as attorney), was a good execution of the instruments under the power, so as to make them valid as the deed and note of Benjamin, and thus effectually to convey the land to Sewall Goodridge by the mortgage under which the plaintiff's title is derived.

"When one writes the name of another to a deed, in his presence, at his request, and by his direction, the act of writing is regarded as the party's personal act, as much as if he had held the pen, and signed and sealed the instrument with his own hand. Story on Agency, § 51; Ball *v.* Dunsterville, 4 T. R. 313; Lovelace's case, W. Jones, 268; Hibblewhite *v.* M'Morine, 6 Mees. & Wels. 200, 214, 215; Gardner *v.* Gardner, 5 Cush. 483.

"In the present instance, the deed and note were not executed by Benjamin personally; nor in his presence, but in his absence; and, so far as appears,

§ 148. This rule, thus laid down, is regularly true in regard to all solemn instruments under seal, although not, as we shall presently

without his knowledge. But, upon the face of the papers, they appear to have been signed by him personally and with his own hand. In fact, they were signed by Levi; but it does not appear, upon the face of the papers, that in signing the name of Benjamin, Levi acted as his agent, or intended to act under the power of attorney from Benjamin, or meant to execute the authority given by that power.

"The deed and note, which thus appear to be signed by Benjamin personally, when, in fact, they were signed by Levi, are not such instruments as Levi was authorized to make. He was authorized to make instruments in the name of Benjamin; not as made by Benjamin personally; but by Levi, in his name, as his attorney. It should appear upon the face of the instruments, that they were executed by the attorney, and in virtue of the authority delegated to him for this purpose. It is not enough, that an attorney in fact has authority, but it must appear, by the instruments themselves which he executes, that he intends to execute this authority. The instruments should be made by the attorney expressly as such attorney; and the exercise of his delegated authority should be distinctly avowed upon the instruments themselves. Whatever may be the secret intent and purpose of the attorney, or whatever may be his oral declaration or profession at the time, he does not in fact execute the instruments as attorney, and in the exercise of his power as attorney, unless it is so expressed in the instruments. The instruments must speak for themselves. Though the attorney should intend a deed to be the deed of his principal, yet it will not be the deed of the principal, unless the instrument purports on its face to be his deed. The authority given clearly is, that the attorney shall execute the deed as attorney, but in the name of the principal.

"There is much learning and much discussion, in the books of the law, as to the proper mode of executing authority by agents. In what form the agent should execute his authority, so as to bind his principal, and not bind himself, has been a subject largely considered in elementary works, and much discussed in numerous adjudged cases. The rule commonly laid down by all the authorities is, that to bind the principal, the instrument must purport, on its face, to be the instrument of the principal, and executed in his name; or, at least, that the tenor of the instrument should clearly show, that the principal is intended to be bound thereby, and that the agent acts merely as his agent in executing it.

"But it is contended, that it is nowhere laid down in any work of authority, or established by any adjudged case, that the agent may put the name of the principal, as his own personal act and signature; the execution of the agent, as agent, not being in any way disclosed. Such an execution does not appear to be warranted by the power delegated to execute the instrument as attorney, but in the name of the principal. Squire *v.* Norris, 1 Lans. 282; Webster *v.* Brown, 2 So. Car. 428." — R.] [So, an assignment of a judgment made on the margin of the record by an agent in his own name, but by authority of his principal, will pass an equitable title at least, Emory *v.* Joice, 70 Mo. 537: and so a deed signed by an attorney who signed only his principal's name has been held good in a recent case, Berkey *v.* Judd, 22 Minn. 287: and where deeds were signed for the grantor by another party at his request, and delivered, and the consideration received, it was held that the grantor could not object to the form of execution, Lovejoy *v.* Richardson, 68 Me. 386; Mut. Ben. Ins. Co. *v.* Brown, 30 N. J. Eq. 193. — ED.]

see, as to instruments not under seal.[1] Therefore, if a person is authorized by a power of attorney to make a conveyance under seal of the lands of his principal; and he makes the conveyance by a deed in his own name, it will be a void conveyance.[2] And it will make no difference in the case, that, in the deed, the agent describes himself as such; as if he says, "Know all men by these presents, that I, A. B., as agent of C. D., do hereby grant, sell, convey," &c.; or if he signs and seals it, "A. B., for C. D.;" for, in such a case, it is still his own deed, and not the deed of his principal.[3] For the

[1] Post, §§ 154, 155, 275–279. [There seems to be a disposition in some parts of this country to relax the rigid rules of the common law in regard to the execution of conveyances by attorneys, and to give effect to the intention of the parties, where it can certainly be ascertained from the deed. Thus, in a recent case a deed by an attorney reading, "Know that I., M., for myself, and as attorney for B., by his duly authorized letters of attorney," was held to be the deed of the principal and not of the attorney, McClure *v.* Herring, 14 Am. Law Rev. 172: and an assignment of a mortgage of land, from a loan association, concluding, "In witness, the said association by J. S., its president, has hereunto set its seal, and the said J. S., president as aforesaid, has hereunto set his hand," signed, "J. S., President of," &c., is in form executed by the association, Murphy *v.* Welch, 128 Mass. 489: so a deed signed "A. B. by C. D. his attorney in fact" was held to be a sufficient execution, without reciting the fact in the body of the deed, Tidd *v.* Rines, 26 Minn. 201: and where A., having a sum of money belonging to B., purchased certain land from C. for B., to whom C. conveyed it, and, for the balance of the purchase-money, executed a mortgage on the land, to C. in the name of B., who after the purchase took possession of the land with a knowledge of said mortgage, it was held that B. could not repudiate the execution by A. of said mortgage, although he had never expressly authorized him to sign it, Fouch *v.* Wilson, 59 Ind. 93. But the distinction has been drawn that a power not under seal may be sufficient to authorize an attorney to sell land, but not to execute the conveyance, Watson *v.* Sherman, 84 Ill. 263: and to the same effect that a signature to a deed by an attorney in his own name may in equity bind his principal, though it is not binding in law, Robbins *v.* Butler, 24 Ill. 387; see Clements *v.* Macheboeuf, 92 U. S. 418. — Ed.]

[2] Combe's case, 9 Co. R. 77 a; 1 Roll. Abridg. *Authority*, p. 330, l. 37; Com. Dig. *Attorney*, C. 14; Frontin *v.* Small, 2 Ld. Raym. 1418; s. c. 2 Str. 705; Wilks *v.* Back, 2 East, 142; Fowler *v.* Shearer, 7 Mass. 14; Elwell *v.* Shaw, 16 Mass. 42; s. c. 1 Greenl. 339; Copeland *v.* Merch. Ins. Co. 6 Pick. 198; Lutz *v.* Linthicum, 8 Pet. 165; 2 Kent, Comm. Lect. 41, pp. 631, 632 (4th ed.); Stone *v.* Wood, 7 Cowen, 453; Clarke *v.* Courtney, 5 Pet. 319, 349, 350; American Jurist for January, 1830, vol. 3, pp. 71–85, where the leading cases are collected in a learned argument of Mr. Professor David Hoffman, of Baltimore; Stinchfield *v.* Little, 1 Greenl. 231; Sheldon *v.* Dunlap, 1 Harr. (N. J.) 245; Townsend *v.* Hubbard, 4 Hill, 351, 357, 358.

[3] Frontin *v.* Small, 2 Ld. Raym. 1418; s. c. 2 Str. 705; Wilks *v.* Back, 2 East, 142; Bacon *v.* Dubary, 1 Ld. Raym. 246; Bac. Abridg. *Leases*, I. § 10; Com. Dig. *Attorney*, C. 14; Spencer *v.* Field, 10 Wend. 87; White *v.* Cuyler, 6 T. R. 176; Appleton *v.* Binks, 5 East, 148; Cayhill *v.* Fitzgerald, 1 Wils. 28, 58; D'Abridge-

same reason, if a person be authorized by a power of attorney to make a release, and he draws and executes the same in his own name, it will not bind his principal, or be the release of the latter.[1] A court of equity might, indeed, if the release were for a valuable consideration, compel the principal to make a release in his own name, or compel the agent to execute a proper release, or grant other relief adapted to the circumstances.[2]

§ 149. Upon the same ground, where an agent of the king is, by letters-patent, authorized to execute a deed of lease for the king, the deed must be drawn and executed in the name of the king, and the king's seal must be affixed thereto; for if the agent affixes his own seal, and says, "In testimony whereof I have hereunto set my seal," the execution will be bad; for unless it be the king's seal, it cannot be his deed of lease.[3] The same principle will apply to the case of a power of attorney given by a corporation to execute a deed. To bind the corporation, the deed must be under the seal of the corporation, and not under the seal of an attorney.[4]

court *v.* Ashley, Moore, 818, pl. 1106; Bogart *v.* De Bussey, 6 John. 94; Taft *v.* Brewster, 9 John. 334; 2 Kent, Comm. Lect. 41, p. 631 (4th ed.); Tippetts *v.* Walker, 4 Mass. 595; Fowler *v.* Shearer, 7 Mass. 14; Elwell *v.* Shaw, 16 Mass. 42; Clarke *v.* Courtney, 5 Pet. 349–351; Martin *v.* Flowers, 8 Leigh (Va.), 158; Hall *v.* Bainbridge, 1 Mann. & Gr. 42; Townsend *v.* Hubbard, 4 Hill, 351; [Skinner *v.* Gunn, 9 Port. 305; Fetter *v.* Field, 1 La. An. 80].

[1] Com. Dig. *Attorney*, C. 13; Moore, 818, pl. 1106; Wells *v.* Evans, 20 Wend. 251. The statute of Maine, of 1823, ch. 220 (vol. 3, p. 49), provides, that deeds made by an agent, in his own name, shall be valid, provided the agent had authority, and it appears on the face of the deed that he meant to execute the authority.

[2] See Yerby *v.* Grisby, 9 Leigh (Va.), 387; McNaughten *v.* Partridge, 11 Ohio, 223.

[3] Bac. Abridg. *Leases*, I. § 10; Anonymous, Moore, 70, pl. 191. The anonymous case in Moore, 70, pl. 191, is very strong in point. There the king, by his letters-patent, had authorized his surveyor to make leases; and the surveyor made a lease beginning, "This indenture, made between our lord the king of the one part, and J. S. of the other part, witnesseth, &c. That our lord the king demiseth," &c. But at the end, the words were, "In testimony whereof, the said (the surveyor) hath hereunto set *his* seal;" and it was held, that the lease was void; for the seal of the surveyor was not the seal of the king; and so the lease was not the lease of the king. See also Clarke *v.* Courtney, 5 Peters, 349–351; Townsend *v.* Hubbard, 4 Hill, 351, 358.

[4] Bank of Columbia *v.* Patterson's Adm'r, 7 Cranch, 299, 308; Damon *v.* Inhab. of Granby, 2 Pick. 345; Tippetts *v.* Walker, 4 Mass. 595, 597. There is a distinction between doing an act by an agent, and doing an act by a deputy, whom the law deems such. An agent can only bind his principal, when he does the act in the name of his principal. But a deputy may do the act, and sign his own name; and it binds his principal; for the deputy in law has the whole

§ 150. The reason of this doctrine, although at first view it may seem somewhat artificial, is not wholly technical, but seems founded in good sense. Where an interest is to pass by an instrument, it must in terms purport to be conveyed by him, in whom alone that interest is vested. A power of attorney to convey is but a naked power, and transfers no interest to the attorney; and, consequently,

power of his principal. Parker *v.* Kett, Salk. 95; Craig *v.* Radford, 3 Wheat. 594. [And in a late American case a deed by a corporation, in which the formal part was "Know all men, &c., that the New England Silk Co., a corporation, by C. C. their treasurer, &c., do hereby grant," &c., and signed thus: "In witness whereof, I, the said C. C., in behalf of said company, and as their treasurer, do hereunto set my hand and seal, C. C., Treasurer of N. England Silk Co.," was held not properly executed, and not the deed of the corporation. Brinley *v.* Mann, 2 Cush. 337. Metcalf, J., said: "It is a rule of conveyancing, long established, that deeds which are executed by an attorney or agent must be executed in the name of the constituent or principal. In Combe's case, 9 Co. R. 76 b, it was resolved, 'that when any has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority.' And in Fowler *v.* Shearer, 7 Mass. 19, Parsons, C. J., says: 'It is not enough for the attorney, in the form of the conveyance, to declare that he does it as attorney; for he being in the place of the principal, it must be the act and deed of the principal, done and executed by the attorney in his name.' This doctrine, which was applied in Elwell *v.* Shaw, 16 Mass. 42, and in other cases cited by the demandants' counsel, and also in Berkeley *v.* Hardy, 8 Dowl. & Ryl. 102, must be applied to the deeds now before us. Both of these deeds were executed by C. Colt, Jr., in his own name, were sealed with his seal, and were acknowledged by him as his acts and deeds. In one of them, it is true, he declared that he acted in behalf of the company, and as their treasurer; and in the other he declared himself to be their treasurer, and to be duly authorized for the purpose of executing it. But this, as we have seen, was 'not enough.' He should have executed the deeds in the name of the company. He should also have affixed to them the seal of the company, and have acknowledged them to be the deeds of the company. 1 Crabb on Real Property, §§ 703, 705; 4 Kent, Comm. (3d ed.) 451; Stinchfield *v.* Little, 1 Greenl. 231; Savings Bank *v.* Davis, 8 Conn. 191; 3 Stewart on Conveyancing, 189. If the deeds had been rightly executed in other respects, the seal which C. Colt, Jr., affixed to each of them (namely, a wafer and a paper, without any stamp or impression), might have been regarded as the seal of the company, according to the decisions in Mill Dam Foundry *v.* Hovey, 21 Pick. 417, and Reynolds *v.* Glasgow Academy, 6 Dana, 37. The case of Warner *v.* Mower, 4 Vt. 385, cited by the tenant's counsel, was decided upon a statute of Vermont, which authorizes certain corporations to convey real estate by a deed of their president, sealed with his seal. The court, in that case, admitted that 'the form of the deed, at common law, would not, probably, be considered good.'" Hatch *v.* Barr, 1 Ohio, 390; Brinley *v.* Mann, 2 Cush. 337; Savings Bank *v.* Davis, 8 Conn. 192; Flint *v.* Clinton Co., 12 N. H. 433; Eagle Woolen Mills Co. *v.* Monteith, 2 Oreg. 277. — R.]

as no interest is vested thereby in the agent, his own conveyance can pass none to his grantee. It cannot pass the interest of the principal; for he is not a party thereto, or the grantor thereof; and it is not the instrument which he has authorized to be executed.[1] In this respect, the case differs from that of a power coupled with an interest in the property; for, there, the deed of the agent may convey the interest vested in him in connection with the power.[2]

§ 151. The same doctrine will apply to cases where a deed is to be made to a person through the instrumentality of his agent. The deed must be made to, and in the name of, the principal; for if it be made to, and in the name of, the agent, although it describes him as agent of the principal, as if it be a grant "to A. B. for, and as agent of, C. D.," the deed will convey nothing to the principal; but it will take effect as a conveyance only to the agent himself, although it may be a trust for his principal.[3] So, if an agent should in a sealed instrument describe himself as an agent, and covenant

[1] Bac. Abridg. *Leases*, I. § 10; Combe's case, 9 Co. R. 77; Lutz *v.* Linthicum, 8 Peters, 165. The reasoning of Lord Chief Baron Gilbert on this subject in Bac. Abridg. *Leases*, I. § 10 (4 Gwillim's Bac. Abridg. 140), is very full on this point. "If one hath power" (says he) "by virtue of a letter of attorney, to make leases for years generally by indenture, the attorney ought to make them in the name and style of his master, and not in his own name. For the letter of attorney gives him no interest or estate in the lands, but only an authority to supply the absence of his master by standing in his stead, which he can no otherwise do than by using his name, and making them just in the same manner and style as his master would do if he were present. For if he should make them in his own name, though he added also, by virtue of the letter of attorney to him made for that purpose; yet such leases seem to be void; because the indenture, being made in his name, must pass the interest and lease from him, or it can pass it from nobody. It cannot pass it from the master immediately, because he is no party; and it cannot pass it from the attorney at all, because he has nothing in the lands. And then his adding *by virtue of the letter of attorney*, will not help it; because that letter of attorney made over no estate or interest in the land to him, and consequently, he cannot, by virtue thereof, convey over any to another. Neither can such interest pass from the master immediately, or through the attorney; for then the same indenture must have this strange effect at one and the same instant, to draw out the interest from the master to the attorney, and from the attorney to the lessee, which certainly it cannot do. And therefore all such leases made in that manner seem to be absolutely void, and not good, even by estoppel against the attorney; because they pretend to be made, not in his own name absolutely, but in the name of another, by virtue of an authority, which is not pursued." See also Clarke *v.* Courtney, 5 Peters, 349, 350.

[2] Hunt *v.* Rousmaniere's Adm'r, 2 Mason, 244; s. c. 3 Mason, 294; s. c. 8 Wheat. 174, 202, 203; s. c. 1 Peters, 1; Post, § 164.

[3] See 1 Stair, Inst. by Brodie, B. 1, tit. 12, § 16; Clarke *v.* Courtney, 5 Peters, 319, 349, 350. See Fox *v.* Frith, 10 Mees. & Wels. 131.

that he himself, or that his principal will do a certain thing, and the deed is executed in his own name, he alone will be liable thereon, and the term "agent," will be deemed a mere *descriptio personæ*.[1]

§ 152. But where an act is to be done *in pais*, or in any other manner than by a written instrument, under seal, there, the act will be so construed, if it may be, as most effectually to accomplish the end required by the principal;[2] for, where the act may take effect, if construed one way, and will be defeated, if construed another way, "ut res magis valeat, quam pereat," it will, to accomplish the intention of the parties, be construed so as to give it validity.[3] Thus, if a power of attorney should authorize an agent to make a surrender of a copyhold, or to make livery of seisin; and the agent should, in making the surrender or livery, say, I., A. B., as attorney of C. D., or by virtue of a letter of attorney from C. D., do surrender, &c., or do deliver to you seisin of such lands (naming them); such an act will be held valid and binding upon the principal, as his own act; because (it is said) such acts are only ministerial or transitory acts *in pais*, the first to be done by holding the court-rod, and the last by delivering a turf or twig; and when the agent does them as an attorney, or by virtue of a letter of attorney from the principal, the law pronounces them to be done by the principal himself, and carries the possession accordingly.[4] So, the delivery of a deed by an agent for the principal, after its due execution, as the deed of the principal, is governed by the same rule; for the delivery is an act *in pais*.[5] The better reason in all such cases seems to be, that as the agent, doing the act, intends it to be done as the act of his principal, his act shall be construed accordingly, and not as his own personal act, upon the maxim already stated.

§ 153. And even in the case of deeds, if the name of the principal be properly stated therein, as the grantor, and the seal and signature of the principal are affixed thereto, the form of the words used in the execution and subscription of the deed by the

[1] Deming *v.* Bullitt, 1 Blackf. (Ind.) 241; Hall *v.* Bainbridge, 1 Mann. & Gr. 42; Post, § 450.

[2] [See Ish *v.* Crane, 8 Ohio St. 535; s. c. 13 Ohio St. 574, 596, 611.]

[3] Parker *v.* Kett, 1 Salk. 95; s. c. 12 Mod. 467; Anderson *v.* Highland Turnpike Co., 16 John. 86.

[4] Bac. Abridg. *Leases for Years*, 1, § 10 (4 Bac. Abridg. by Gwillim, 140); Com. Dig. *Attorney*, C. 14; Combe's case, 9 Co. R. 75; Parker *v.* Kett, 1 Salk. 95; s. c. 12 Mod. 467; Clarke *v.* Courtney, 5 Peters, 319, 350, 351.

[5] Ibid.

agent will not be material. The true and best mode in such cases undoubtedly is, to sign the name of the principal ("A. B.") and to add, "by his attorney, C. D." But it will be sufficient, if the signature in such case be, "For A. B." (the principal) "C. D." (the agent); for, under such circumstances, the order of the words is not material,[1] as the deed purports on its face to be the deed of the principal; and the intention is to execute it in his name, and as his deed.[2] Indeed, in all cases where the instrument purports on its face to be intended to be the deed of the principal, and the mode of execution of it by the agent, however irregular and informal, is not repugnant to that purport, it would probably be construed to be the deed of the principal, especially where the *In testimonium* clause is, that the principal has thereto affixed his seal.[3]

[1] [Mussey *v.* Scott, 7 Cush. 216; Hunter *v.* Miller, 6 B. Monroe, 612; Wilburn *v.* Larkin, 3 Blackf. 55; Martin *v.* Almond, 25 Mo. 313; Deming *v.* Bullitt, 1 Blackf. (Ind.) 241.]

[2] Wilks *v.* Back, 2 East, 142; Abbott on Shipp. Pt. 3, ch. 1, § 2, note (*c*). In this case, the deed purported to be the deed of M. W. & J. B., and it was executed, having two seals, thus: "M. W." (L. S.) "for J. B. M. W. (L. S.);" and it was held to be the deed of J. B. Mr. Justice Grose said: "Whether the attorney put his name first or last, cannot affect the validity of the act done." Mr. Justice Lawrence said: "Here the bond was executed by W. for, and in the name of his principal, and this is distinctly shown by the manner of making the signature. Not that even this was necessary to be shown; for if W. had sealed and delivered it in the name of B., that would have been enough without stating that he had so done. There is no particular form of words required to be used, provided the act be done in the name of the principal." Mr. Justice Le Blanc said: "I cannot see what difference it can make as to the order in which the names stand. But if, in this case, W., instead of putting the name of his principal (B.) had made the execution in his own name only, as 'W. (L. S.),' the case might have been different." Query, what would have been the effect, if the *In testimonium* clause had been, "In testimony whereof the said J. B. (the principal) hath hereunto set his seal;" and the signature had been "W. (L. S.)"? The whole subject has been discussed with a good deal of learning by Mr. Professor Hoffman, in an article in No. 5 of the American Jurist, pp. 71–81; Mears *v.* Morrison, 1 Breese (Ill.), 172; Deming *v.* Bullitt, 1 Blackf. (Ind.) 241, 242. It is to be remarked, that this doctrine, as to the manner of the execution of a sealed instrument in order to bind the principal, is to be applied to the mere liability of the principal at law on the instrument; for there are many cases, where, in equity, the principal might be bound to fulfil the contract, notwithstanding he was not bound by it at law. Van Reimsdyk *v.* Kane, 1 Gall. 630; S. C. 9 Cranch, 153; Devinney *v.* Reynolds, 1 Watts & Serg. 328; McNaughten *v.* Partridge, 11 Ohio, 232; Ante, § 148; Post, § 162.

[3] Ibid. and *supra*, note; Post, § 150. See also Anon. Moore, 70, pl. 191; Devinney *v.* Reynolds, 1 Watts & Serg. 328.

§ 154. But although the rule is thus strict in relation to the mode of executing sealed instruments, where, from the objects of the instruments, as well as the due technical and legal operation of the same, it is essential that they should be in the name of the principal, and under his seal; yet a more liberal exposition is allowed in cases of unsolemn instruments, and especially of commercial and maritime contracts, which are usually drawn up in a loose and inartificial manner.[1] In such cases, in furtherance of the public policy of encouraging trade, if it can, upon the whole instrument, be collected, that the true object and intent of it are to bind the principal and not to bind the agent, courts of justice will adopt that construction of it, however informally it may be expressed.[2] Thus, where an agent duly authorized, made a promis-

[1] N. E. Mar. Ins. Co. *v.* De Wolf, 8 Pick. 56; Ante, § 147, note; Bell *v.* Bruen, 1 Howard, Sup. Ct. 169; s. c. 17 Peters, 161.

[2] Ibid.; Pentz *v.* Stanton, 10 Wend. 271; Mechanics' Bank of Alexandria *v.* Bank of Columbia, 5 Wheat. 326; Post, §§ 269, 270, 275, 276, 395–400; Townsend *v.* Hubbard, 4 Hill, 351. [The rule which may be deduced from the somewhat conflicting cases seems to be, that an agent may free himself from personal liability, upon a contract for the sale of goods, either by signing as agent or by using in the body of the contract words importing agency. Thus, the defendant was held to be not personally responsible on the following contract: "We have this day sold to you, on account of M. & Co., 2,000 cases of oranges, H. & Co." Gadd *v.* Houghton, L. R. 1 Ex. D. 357. But the rule with regard to promissory notes seems to be somewhat more strict. In Aggs *v.* Nicholson, 1 H. & N. 165, a promissory note, sealed with the company's seal, and beginning, "We, two of the directors of the A. L. A. Society, by and in behalf of said society, do promise," &c., and signed A. B. & C. D., directors, was held to be the note of the company, and not of the directors. So, with a note signed A., B., and C., directors, in the body of which are these words: "For value received, on account of the London and Birmingham Iron & Hardware Co." Lindus *v.* Melrose, 3 H. & N. 176. So, on a promissory note, "I promise to pay bearer on demand," and signed, "for A. B., C. D., R. M.," the principal was held liable, and not the agent. *Ex parte* Buckley, 14 M. & W. 469. And a note purporting to be the promise by the president and directors of a corporation, and signed "J. W., Cashier," was held to be the note of the corporation. Farmers' Bank *v.* Troy City Bank, 1 Douglass, 107. So, a note in these words, "We, directors of R. Co. (an unincorporated company), for ourselves and other shareholders of said company, do jointly and severally promise," and signed A., B., C., directors, was held to be the note of the company, and the stockholders were bound jointly, but not severally. Maclae *v.* Sutherland, 3 El. & Bl. 1. So, a note, purporting to be made by the inhabitants of "School District No. 5," and signed "A. B., Treasurer of District No. 5," is the note of the district. Whitney *v.* Stowe, 111 Mass. 368; Blanchard *v.* Blackstone, 102 Mass. 343; Carpenter *v.* Farnsworth, 106 Mass. 561. So, a draft drawn upon a corporation, and accepted by A. & B., directors, it was held that the acceptance was that of the company.

sory note thus: "I promise to pay J. S. or order," &c., and signed the note "Pro C. D. A. B.," it was held to be the note of the principal, and not of the agent, although the words were, "I promise."[1] So, where A. and B. wrote a note in these words: "*We* jointly and severally promise," and signed it A. and B. for C., it was held to be the note of C., and not of A. and B., the agents.[2] So, where the note was, "I promise," &c., and it was signed by the agent, "For the Providence Hat Manufacturing Company," A. B. (the agent); it was held to be a note of the company, and not of the agent.[3] So a promissory note of a like tenor, signed by the agent in this manner: "A. B., agent for C. D.," has been held to be the note of the principal, and not of the agent.[4] So, where a promissory note was in these words: "I, the subscriber, treasurer of the Dorchester Turnpike Corporation, for value received, promise," &c.; and it was signed "A. B., Treasurer of the Dorchester Turnpike Corporation," it was held to be the note of the corporation, and not of the treasurer.[5] So, where a note purported to be a promise by "The President and Directors," of a particular corporation, and was signed "A. B., President," it was held to be the note, not of A. B.,

Okell *v.* Charles, 34 L. T. R. N. S. 822; Chipman *v.* Foster, 119 Mass. 189. And where the agent of the Dubuque Lumber Co. gave three notes, dated at the office of the company, and signed "A. B., P. [President], D. L. Co.," it was held that the initials were sufficient, and that the company, and not A. B., was liable. Lacy *v.* Dubuque Lumber Co., 43 Iowa, 510. See also Alexander *v.* Bank of Rutland, 24 Vt. 227; Olcott *v.* Tioga R. R. Co., 27 N. Y. 559; Alexander *v.* Sizer, L. R. 4 Ex. 102; Fairlie *v.* Fenton, L. R. 5 Ex. 169; Means *v.* Swormstedt, 32 Ind. 87; Tucker Manuf. Co. *v.* Fairbanks, 98 Mass. 101; Haile *v.* Peirce, 22 Md. 327; Sturdivant *v.* Hull, 59 Maine, 172. So, where a written contract for the building of a church edifice was entered into by the defendants as a committee of a religious society, and was subscribed by them as such, and the wording of the contract was such as to show clearly the intention of the parties that the religious society should be bound, it was held that the committee were not personally liable thereon. Stanton *v.* Camp, 4 Barb. 274; Providence Tool Co. *v.* U. S. Manuf. Co., 120 Mass. 35. See also Fiske *v.* Eldridge, 12 Gray, 474; Gillig *v.* Lake Bigler R. Co., 2 Nev. 214; Cutler *v.* Ashland, 121 Mass. 588. — ED.]

[1] Long *v.* Coburn, 11 Mass. 97; [King *v.* Handy, 2 Ill. App. 212].

[2] Rice *v.* Gove, 22 Pick. 158; Post, §§ 275, 276, 395.

[3] Emerson *v.* Prov. Hat Manuf. Co., 12 Mass. 237.

[4] Ballou *v.* Talbot, 16 Mass. 461; [Despatch Line of Packets *v.* Bellamy Manuf. Co., 12 N. H, 229; Roberts *v.* Button, 14 Vt. 195; Robertson *v.* Pope, 1 Richardson, 501; Campbell *v.* Baker, 2 Watts, 83. But see, *contra*, De Witt *v.* Walton, 5 Selden, 571].

[5] Mann *v.* Chandler, 9 Mass. 335. See Hills *v.* Bannister, 8 Cowen, 31; Post, § 276; Barker *v.* Mechan. Fire Ins. Co. 8 Wend. 94; Mott *v.* Hicks, 1 Cowen, 513; Brockway *v.* Allen, 17 Wend. 40.

but of the corporation.[1] But if the note had been, "I, A. B., President of the Corporation (naming it), promise to pay," &c., it would (it seems) have been deemed to be the personal note of A. B., and not of the corporation.[2] So, where the agent of a corporation drew a bill of exchange upon the president of the corporation, styling him such, and the latter accepted the bill, it was held, that he was not personally liable, if he had authority to accept the bill; but the corporation was alone liable.[3] So, where the agents of a corporation, being duly authorized, made a written contract, as follows: "We hereby agree to sell," &c., and signed it as agents of the corporation, it was held, that they were not personally bound thereby; but the corporation was.[4] So, where A., an agent duly authorized, wrote on a note, "By authority from B., I hereby guaranty the payment of this note," and signed in his own name, A.; it was held to be the guaranty of the principal, and not of the agent.[5] So, where

[1] Mott *v.* Hicks, 1 Cowen, 513. See also Bowen *v.* Morris, 2 Taunt. 374; Shelton *v.* Darling, 2 Conn. 435; Brockway *v.* Allen, 17 Wend. 40; Post, § 278 and note, § 279.

[2] Barker *v.* Mechan. Fire Ins. Co. 3 Wend. 94. But see Brockway *v.* Allen, 17 Wend. 40; Hills *v.* Bannister, 8 Cowen, 31; Post, § 276; Mann *v.* Chandler, 9 Mass. 335. It is not easy to reconcile all the cases in the books on this subject. Although I cannot but think, that the true principle to be deduced from them is that stated in the text. See Paley on Agency, by Lloyd, pp. 378–385, and Bayley on Bills (2d Amer. ed. from 5th London ed.), by Phillips & Sewall, ch. 2, § 7, pp. 68–76 (ed. 1836), and notes, Ibid; Bowen *v.* Morris, 2 Taunt. 374; Kennedy *v.* Gouveia, 3 Dowl. & Ryl. 503; Dubois *v.* Del. & Hudson Canal Co. 4 Wend. 285. In Pentz *v.* Stanton, 10 Wend. 271, where an agent drew a bill for a purchase of goods, on account of his principal, and signed the bill A. B., agent, not stating the name of his principal, it was held that he, and not his principal, was personally bound by the bill, as drawer. But the principal was held liable for the goods, on a count for goods sold and delivered, as the form of the bill showed that exclusive credit was not given to the agent. There is a curious case cited in the Digest, Lib. 14, tit. 3, l. 20, where the question, whether an agent, who wrote a letter to a creditor, stating himself to be agent of his principal, was personally liable on the contract stated in the letter; and it was held that he was not, as he wrote confessedly as an agent. Pothier, Pand. Lib. 14, tit. 3, n. 2; 1 Domat, B. 1, tit. 16, § 3, art. 8. In Dubois *v.* Del. & Hudson Canal Co. 4 Wend. 285, an agent signed and sealed a contract, "M. W., agent for the Del. & Hudson Canal Co.;" and it was held, that he was not personally liable thereon, as he was authorized to make the contract, although it was not under the seal of the corporation. s. p. Randall *v.* Van Vechten, 9 John. 60. But see Hopkins *v.* Mehaffey, 11 Serg. & R. 129; Post, §§ 155, 274–278; [Kean *v.* Davis, Spencer, 426].

[3] Lazarus *v.* Shearer, 2 Ala. 718, N. S. [See also Robertson *v.* Pope, 1 Rich. 501; Wyman *v.* Gray, 7 Har. & John. 409; Lyman *v.* Sherwood, 20 Vt. 42.]

[4] Marny *v.* Beekman Iron Co. 9 Paige, 188; Evans *v.* Wells, 22 Wend. 325.

[5] N. E. Mar. Ins. Co. *v.* De Wolf, 8 Pick. 56. See Passmore *v.* Mott, 2 Binn. 201; Post, §§ 160 *a*, 161, 269, 270, 275, 276, 395–400.

A., an agent, entered into and signed an agreement "as agent for and on behalf of B.," and B. shortly afterwards wrote on it the words, "I hereby sanction this agreement, and approve of A.'s having signed it on my behalf;" it was held to be the agreement of B., and that A. was not personally responsible thereon.[1] So, where on a sale of real property by a corporation, a memorandum of the sale was signed by the parties, on which it was stated, that the sale was made to A. B., the purchaser, and that he and C. D., "mayor of the corporation, on behalf of himself and the rest of the burgesses and commonalty of the borough of Caermarthen, do mutually agree to perform and fulfil, on each of their parts respectively, the conditions of sale," and then came the signature of the purchaser, and of "C. D., mayor," it was held, that the agreement was that of the corporation, and not that of the mayor personally; and that, consequently, the mayor could not sue thereon.[2] So, where in articles of agreement the covenants were in the name of a corporation without mention of any agent, but the instrument was signed by the president of the corporation by his private name on behalf of the corporation, and sealed with his private seal, it was held, that he was not personally liable thereon.[3] On the other hand, unless some agency is apparent on the face of the instrument, it has been not unfrequently held, that the principal is not bound, although the agent had full authority to make the contract.[4] Thus, where a wife had full authority to sign notes for her husband, and she made a note in her own name, not referring to her husband, either in the body of the note or in the signature, it was held, that the husband was not bound.[5] So, where A., B., and C. made a note

[1] Spittle *v.* Lavender, 2 Brod. & Bing. 452.

[2] Bowen *v.* Morris, 2 Taunt. 374, 387. See Kennedy *v.* Gouveia, 3 Dow. & Ryl. 503; Hopkins *v.* Mehaffey, 11 Serg. & R. 129; Meyer *v.* Barker, 6 Binn. 228, 231. See Woodes *v.* Dennett, 9 N. H. 55; Post, §§ 275, 276.

[3] Hopkins *v.* Mehaffey, 11 Serg. & R. 129; Post, § 273, note.

[4] Ante, § 147, note.

[5] Minard *v.* Mead, 7 Wend. 68. [But the contrary has recently been held in England. Lindus *v.* Bradwell, 5 Com. B. 583. And where the makers of a note choose to contract in their own names, upon behalf of a corporation, the obligation not appearing to be that of the corporation, on its face, evidence is not admissible to show that it was intended to be the note of the corporation. Hypes *v.* Griffin, 89 Ill. 134. And so, where a bill of exchange is drawn by an agent in his own name, the principal is not liable thereon, although it contains a direction to the drawee to charge the amount to the account of the principal. Bank of North America *v.* Hooper, 5 Gray, 567. Dewey, J., there said: "The consideration of the questions arising in the case of Eastern Railroad *v.* Benedict, 5 Gray, 561, has led to a full examination of the adjudicated cases

as follows: "We, the subscribers, jointly and severally, promise to pay D., or order, for the Boston Glass Manufactory, the sum of ——," and signed the note in their own names, without saying "as agents," it was held, that they were personally bound, and not the

upon the question of the right of the principal, or real party in interest, to sue in his own name on a written promise made to his agent; and, as connected therewith, the liability of the principal to be sued and charged in damages for the breach of a contract made by his agent.

"To a certain extent, we have found the law to authorize the introduction of oral evidence as to the parties in interest, and for the purpose of showing from whom the consideration moved, or for whose benefit the promise was made. The cases cited, and particularly the English cases, are very decisive in favor of the exercise of this right in cases of ordinary simple contracts, extending it perhaps somewhat further than we should feel authorized to do, without modifying some of the views stated in Stackpole *v.* Arnold, 11 Mass. 27; unless those remarks are to be considered as made peculiarly with reference to bills of exchange or negotiable promissory notes. While the recent English cases are found to be very strong in favor of the right to charge an unknown principal upon contracts made by his agent, upon oral proof of who is the real party, yet there will be found to be a leading distinction taken between cases of commercial paper in the form of bills of exchange and negotiable promissory notes, and other simple contracts — holding that no one but a party to such negotiable paper can be sued for the non-payment thereof. Byles on Bills (5th ed.), 26. Such is the doctrine of Emly *v.* Lye, 15 East, 7, where it was held that in the case of a bill of exchange drawn by one only, it was not competent to charge others as parties in interest, but that the liability was confined to the party who signed the instrument. In Beckham *v.* Drake, 9 Mees. & Wels. 92, where upon a written contract it was held that the real party in interest might be shown by oral evidence, the court distinctly except negotiable instruments from the application of the rule, Lord Abinger, saying, 'Cases of bills of exchange are quite different in principle.' — 'By the law-merchant, a chose in action is passed by indorsement, and each party who receives the bill is making a contract with the parties upon the face of it, and with no other party whatever.'

"The American cases will, we think, be found to maintain the same doctrine. Pentz *v.* Stanton, 10 Wend. 276, is strong to this point. Our own case of Stackpole *v.* Arnold, 11 Mass. 27, was a direct application of this principle. That was a suit upon a negotiable note, and the defendant's name was not on the paper. 5 Gray, 565. The oral evidence offered was, however, full to the point, that the person who signed the note was in fact the agent of the defendant, and that the note was given for the defendant's debt. But the court held that no action could be maintained on the note against the defendant. That case has ever been recognized, certainly to the extent of its application to negotiable paper, as the law of Massachusetts. Bedford Commercial Ins. Co. *v.* Covell, 8 Met. 442; Taber *v.* Cannon, 8 Met. 460. If sound, it meets the present case, and discharges the private estate of Horace Gray from all liability on the draft." As to bills of exchange, it is said that the agent must either sign the name of the principal to the bill, or it must appear on the face of the bill itself, in some way, that it was drawn for him, or the principal will not be bound. Anderton *v.* Shoup, 17 Ohio, N. s. 128. — Ed.]

corporation.[1] So, where A. (an agent) made a promise in the following terms, "I undertake, on behalf of Messrs. E. & Co., to pay," it was held on the face of the paper to be the promise of A., as agent of the principals, and not as himself a principal; and that A. was not liable on the promise personally, unless it was proved that he had no authority to make the contract, or that he exceeded the authority.[2]

§ 155. The same principles of construction will apply to cases where bills are drawn, or accepted, or indorsed by agents. If, from the nature and terms of the instrument, it clearly appears not only that the party is an agent, but that he means to bind his principal, and to act for him, and not to draw, accept, or indorse the bill on his own account, that construction will be adopted, however inartificial may be the language, in furtherance of the actual intention of the instrument. But, if the terms of the instrument are not thus explicit, although it may appear that the party is an agent, he will be deemed to have contracted in his personal capacity.[3] And there is no difference on this point, whether the instrument be a deed or an unsealed contract.[4] Thus, if an agent should execute a deed in his own name, and should thereby, "for and on behalf" of his principal, covenant, &c; he would be personally bound thereby, and not his principal.[5] So, if an unsealed instrument should pur-

[1] Bradlee *v.* The Boston Glass Manufactory, 16 Pick. 347. This case seems distinguishable from that of Rice *v.* Gove, 22 Pick. 158, principally in the circumstance, that the signatures of A., B., C. did not purport to be as agents. Post, §§ 275, 276; Ante, § 147, and note. [See also Savage *v.* Rix, 9 N. H. 263; Trask *v.* Roberts, 1 B. Mour. 201, as to the effect of the words "jointly and severally."]

[2] Dowman *v.* Jones, 7 Queen's Bench, 103.

[3] Stackpole *v.* Arnold, 11 Mass. 27, 29; Leadbitter *v.* Farrow, 5 M. & Selw. 345; Kennedy *v.* Gouveia, 3 Dowl. & Ryl. 503; Stevens *v.* Hill, 5 Esp. 247; 2 Kent, Comm. Lect. 41, pp. 630, 631 (4th ed.); Tippets *v.* Walker, 4 Mass. 595; White *v.* Skinner, 13 John. 307; Ante, § 154; Post, §§ 269, 275, 276; Dusenbury *v.* Ellis, 3 John. Cas. 70; Hastings *v.* Lovering, 2 Pick. 214, 221; Mills *v.* Hunt, 20 Wend. 431; Newhall *v.* Dunlap, 2 Shepley, 280; Higgins *v.* Senior, 8 Mees. & Wels. 834, 844; Aikin *v.* Bedford, 17 Martin, 502; Pentz *v.* Stanton, 10 Wend. 271; Eaton *v.* Bell, 5 B. & Ald. 34. A similar doctrine seems to pervade the Scottish law, and in its application to particular cases, has given rise to no small diversity of opinion. See Thompson on Bills of Exchange, pp. 218, 219 (2d ed.), 1836; Post, § 275 *a*; [Bedford Com. Ins. Co. *v.* Covell, 8 Met. 442].

[4] Burrell *v.* Jones, 3 B. & Ald. 47; Iveson *v.* Conington, 1 B. & Cressw. 160; Post, §§ 269, 273–276, 290; Ante, § 154; Pentz *v.* Stanton, 10 Wend. 270, 271.

[5] Appleton *v.* Binks, 5 East, 148; Cayhill *v.* Fitzgerald, 1 Wilson, 28, 58;

port to be a memorandum of agreement between A. B. on behalf of C. D., of the one part, and E. F., of the other part, to execute a lease of certain premises of the principal, it would be held to be the contract of the agent, and binding on him personally.[1] *A fortiori*, an agent will be held to be personally bound, if the name or character of the principal should not appear on the instrument; or, if it should appear that no other person than himself could be legally bound by it,[2] although he should sign his name thereto as agent, or as acting in an official capacity.[3]

§ 156. We shall have occasion, hereafter, to consider somewhat more at large the cases in which an agent incurs a personal liability, on contracts made by himself;[4] and therefore shall content ourselves, in this place, with a few other illustrations, founded upon

Cass *v.* Ruddle, 2 Vern. 280; Norton *v.* Herron, Ryan & Mood. 229; s. c. 1 Carr. & Payne, 648; Kennedy *v.* Gouveia, 3 Dowl. & Ryl. 503; Duvall *v.* Craig, 2 Wheat. 45; 3 Chitty on Com. & Manuf. 211, 212; 2 Kent, Comm. Lect. 41, pp. 361, 362 (4th ed.); Post, § 269.

[1] Norton *v.* Herron, 1 Carr. & Payne, 648; s. c. 1 Ryan & Mood. 229; Hopkins *v.* Mehaffey, 11 Serg. & R. 139; Post, §§ 269, 270, 274, note.

[2] Norton *v.* Herron, 1 Carr. & Payne, 648; Bayley on Bills, by Phillips and Sewall, from 5th London ed., ch. 2, § 7, pp. 72, 73, and notes; Pentz *v.* Stanton, 10 Wend. 271; Post, §§ 280–287.

[3] [Thus, where a note beginning "We, the directors of the A. B. Company, &c.," was signed by "Richard J. Marsh, Chairman," and by others, it was held that the defendants were personally liable. Dutton *v.* Marsh, L. R. 6 Q. B. 361; Paice *v.* Walker, L. R. 5 Ex. 169. So, where a parish vestry borrowed money upon notes signed "A. & B. Church Wardens and Overseers," the makers were held personally liable. Crew *v.* Pettitt, 3 N. & M. 456. So, where a note was headed "Midland Counties Building Society," and signed by "W. R. H., Secretary, and by A. & B., Directors," it was held that by signing as "Secretary," W. R. H. did not relieve himself from personal responsibility on the note. Bottomley *v.* Fisher, 1 H. & C. 211; Price *v.* Taylor, 5 H. & N. 540. So, promissory notes, signed by C. N., "President of Dorchester Avenue Railroad," Haverhill Mutual Fire Insurance Co. *v.* Newhall, 1 Allen, 130: by "M., Treasurer of D. Association," Mellen *v.* Moore, 68 Maine, 390: by "A. & B., School Trustees," Cahokia School Trustees *v.* Rautenberg, 88 Ill. 219: by "A. & B., Trustees of F. Church," Hayes *v.* Matthews, 63 Ind. 412; Hayes *v.* Brubaker, 65 Ind. 27; Powers *v.* Briggs, 79 Ill. 493; Hays *v.* Crutcher, 54 Ind. 260: by "A. B. & C., members of Executive Committee, on behalf of L. R. Company," Gray *v.* Raper, L. R. 1 C. P. 694: by "A. B., Captain of Co. I., 49th Mo. Reg't," Blakesley *v.* Bennecke, 59 Mo. 193: by "L. R., Receiver," Towne *v.* Rice, 122 Mass. 67: by "A. B., Administrator," Harrison *v.* McClelland, 57 Ga. 531: by "A. B., Agent," Bartlett *v.* Hawley, 120 Mass. 92; Graham *v.* Campbell, 56 Ga. 258, — were held in each case to have been the personal notes of the signers. See Tanner *v.* Christian, 4 El. & Bl. 591; Cooke *v.* Wilson, 38 Eng. L. & Eq. 361. — Ed.]

[4] Post, §§ 260, 270, 272–276; Ante, §§ 154, 155.

written instruments, to justify the foregoing statements. Thus, if a broker should sell goods, and draw upon the buyer for the amount, in his own name, in favor of his principal, if the bill should be dishonored, he would be personally liable, unless some special words were used in the bill to prevent it; and this liability would not only extend to third persons, but even to his principal, although he was known to be a mere agent. For, in such a case, the bill imports, on its face, a personal liability, as drawer, in favor of all persons, who are, or become parties to the bill: and there is nothing in the character of an agent, which excludes such personal liability, if he chooses voluntarily to incur it in favor of his principal, as well as in favor of third persons.[1] So, if a known agent should draw a bill on a third person, in favor of the payee, and direct the drawee to place the amount to the *debit* of his principal, he would be personally liable on the bill to the payee, unless he use other words to exclude it.[2]

§ 157. Precisely the same personal liability will attach to an agent, who, in his own name, signs a note as maker, or a bill as drawer, or accepts a bill, or indorses a bill or note generally; for in such a case, although he is a known agent, the making, or accepting, or indorsing of the instrument, is treated as an admission that it is his personal act, not only in respect to third persons, but also in respect to his principal.[3]

[1] Bayley on Bills (5th ed.), ch. 2, § 7, p. 68; Post, § 269; Le Fevre *v.* Lloyd, 5 Taunt. 749; Mayhew *v.* Prince, 11 Mass. 54; Stackpole *v.* Arnold, 11 Mass. 27, 29; Thompson on Bills of Exchange, pp. 218, 227, 228 (2d ed. 1836); Post, § 269. But see Sharp *v.* Emmett, 5 Whart. 288.

[2] Leadbitter *v.* Farrow, 5 M. & Selw. 345; Bayley on Bills (5th ed.), ch. 2, § 7, n. 46; Eaton *v.* Bell, 5 B. & Ald. 34; Post, § 269.

[3] Stackpole *v.* Arnold, 11 Mass. 27, 29; Goupy *v.* Harden, 7 Taunt. 159; Leadbitter *v.* Farrow, 5 M. & Selw. 345; Maber *v.* Massias, 2 W. Bl. 1072; Le Fevre *v.* Lloyd, 5 Taunt. 749; Stevens *v.* Hill, 5 Esp. 247. But see Kidson *v.* Dilworth, 5 Price, 564. In respect to the principal, the doctrine may, in many cases, require to be qualified; for if, as between him and the agent, there was no intention to create a personal liability, it will not arise. See Miles *v.* O'Hara, 1 Serg. & R. 32; Kidson *v.* Dilworth, 5 Price, 564; Post, § 269; Sharp *v.* Emmett, 5 Whart. 288. In this last case it was held, that if an agent remits a bill in payment, for goods sold on account of his principal, and indorses the bill, he does not thereby become responsible thereon to his principal, if he received no consideration for guaranteeing the bill, and does not expressly undertake to do so. [Heuback *v.* Mollman, 2 Duer, 260; Castriqne *v.* Buttigieg, 10 E. F. Moore, 94, before the privy council, where it was said that in Goupy *v.* Harden, 7 Taunt. 159, there is an intention to make the agent liable.]

§ 158. Upon the same ground, where A., the consignee and agent of a ship, entered into an agreement of charter-party with the master of the ship; and the agreement stated, that it was agreed between the master, of the one part, and A., consignee and agent of the ship and cargo, on behalf of B., the principal, on the other part; and A. signed the agreement in his own name, and not as agent; it was held, that the agent A. was personally bound by the instrument; for the agent and master only were parties to it.[1] So, where an agent, by a writing, acknowledged himself to have received goods for his principal, and by the same writing, bound himself to pay for the same at a day certain, he was held personally liable.[2]

§ 159. The doctrine has been carried constructively a step farther; for it has been held, that a bill drawn by the principal upon an agent, with the description of his office or agency annexed, and directed to be placed to the account of the principal, will, if he accepts it generally, bind him personally; and the description will be treated as a mere designation of the person, and not as a qualification of his personal liability.[3]

[1] Kennedy *v.* Gouveia, 3 Dow. & Ryl. 503; Meyer *v.* Barker, 6 Binn. 228, 234. See Thompson on Bills of Exchange, 218, 227, 228 (2d ed.), 1836. [But where a charter-party was expressed to be made between the plaintiffs and defendants, and was signed by the defendants, as "agents to merchants," they were held personally liable, under a trade usage, because their principal was not disclosed within a reasonable time. Hutchinson *v.* Tatham, L. R. 8 C. P. 482. So a charter-party between P. and W., agent for E. W. & Son, and signed by W. without any restriction, binds him personally. Parker *v.* Winslow, 7 El. & Bl. 944. But a charter-party, made in London, between the plaintiff and the defendants, agents to S. F., Charterer, was signed "for S. F., G." (the defendants), as agents, it was held that defendants were not personally liable. Deslandes *v.* Gregory, 2 El. & El. 602. — Ed.]

[2] Dyer, 230 *b*; Post, §§ 269–273.

[3] Thomas *v.* Bishop, 2 Str. 955; s. c. Cas. temp. Hard. 1; Bayley on Bills (5th ed.), ch. 2, § 7, note 48. This case seems to press the doctrine to the utmost limit of the law, if, indeed, upon principle, it is sustainable at all. Post, § 269, note. In Mott *v.* Hicks, 1 Cowen, 513, where the principal made a note payable to an agent (in his, the agent's, own name), or order, and the payee indorsed the note "A. B., agent;" it was held that the indorsee could not recover personally against A. B. on this indorsement, he well knowing all the facts, and that the instrument was merely to give currency to the note. See also Rheinhold *v.* Dertzell, 1 Yeates, 39; Miles *v.* O'Hara, 1 Serg. & R. 32; Kidson *v.* Dilworth, 5 Price, 564, 572, 573. See also Bayley on Bills, 2d Amer. from the 5th English ed. by Phillips & Sewall, in notes to p. 73 (ed. 1836). See Thompson on Bills, pp. 218, 227, 228 (2d ed. 1836). [So, where a bill of exchange, purporting to be "for value received in machinery

§ 160. As, on the one hand, we have seen, that agents cannot, ordinarily, bind their principals by a written contract under seal, executed in the agent's own name,[1] and thus give a title to an action against them; so, on the other hand, the principal cannot, ordinarily, avail himself of such a contract under seal, and sue the other contracting party thereon; for it is treated as a contract merely between the parties named in it, although one is known to be acting in the character of an agent.[2] But even in cases of contracts so made under seal by an agent, there are exceptions to the rule; and it does not universally follow, that, although no action lies by, or against, the principal thereon, therefore no obligations

supplied to the adventurers in Hayter and Holne Moore Mines" was directed to the defendant as an individual, and he wrote across the bill the words "Accepted for the company, W. C., Purser," he was held personally liable as acceptor, although he was not a member of the company, and had authority as purser to accept the bill. Mare *v.* Charles, 34 Eng. Law & Eq. 138. Lord Campbell said: "I am of opinion that the defendant is personally liable as acceptor of these bills, and I come to this conclusion on principle and authority. The bills are drawn on him as an individual. In the body of them, to be sure, the consideration is stated to be for 'machinery supplied the adventurers in Hayter and Holne Moore Mines.' The defendant accepts the bills in these words: 'Accepted for the companies. William Charles, purser.' Now, I think that this will bear the interpretation that the defendant makes himself personally liable as acceptor; and we ought to put such a construction on the words as will not make the acceptance void, ut res magis valeat quam pereat. The defendant must be supposed to have known that the bills would be entirely void unless he made himself personally liable on them. There is nothing like a disclaimer of personal liability, as might have been the case if the words '*per proc.*' had been used. It seems to me to make no difference that the consideration is for goods supplied to the company. This only shows that the company are the parties ultimately indebted, and that as between the defendant and them, there was an arrangement that he was to be repaid what he might have paid. In that sense he accepts for the company. This case falls within the principle of Thomas *v.* Bishop, which may have been doubted on the other side of the Atlantic, but has always been looked upon as good law here. It is not necessary to say whether we agree with all the observations in Nicholls *v.* Diamond. The acceptance was there '*per proc.*,' which might have amounted to a disclaimer of personal liability, if the defendant had not been a member of the company. We need not decide whether, if such words had been used here, the defendant would have been liable." See also Nicholls *v.* Diamond, 9 Exch. 154; 24 Eng. Law & Eq. 403; Owen *v.* Van Uster, 1 Eng. Law & Eq. 396; 10 Com. B. 318. — R.]

[1] Ante, §§ 147–154.

[2] United States *v.* Parmele, 1 Paine, Cir. 252; Clarke's Executors *v.* Wilson, 3 Wash. Cir. 560; New England Mar. Ins. Co. *v.* De Wolf, 8 Pick. 56, 61; Andrews *v.* Estes, 2 Fairf. 267; Clarke *v.* Courtney, 5 Peters, 319, 349, 350; Ante, §§ 147–154.

are created thereby between the principal and the other contracting party; for in many cases, such a contract will be collaterally binding on the principal, and create an implied obligation on his part to fulfil its stipulations, and entitle him also to corresponding rights against the other contracting party, although the direct remedy for a breach of the original contract may be, or must be, exclusively sought by or against the immediate parties thereto.[1] The learned author of a very valuable work on shipping, speaking on this subject, says: "I apprehend, the owners of the ship may be made responsible, either by a special action on the case, or by a suit in equity, for the faithful performance of the stipulations of a charter-party, made by the master under the circumstances before mentioned;"[2] that is, in cases, where the owners have authorized the master to enter in the charter-party. If this be so, there can be no reason why the owners should not reciprocally have an action on the case, or a bill in equity, to compel the charterer to fulfil his obligations, under the charter-party.[3]

§ 160 *a*. In respect to written contracts, not under seal, a far more liberal doctrine has been established. It is very clear from the authorities, that it is not indispensable, in order to bind the principal, that such a contract should be executed in the name, and as the act, of the principal. It will be sufficient, if upon the whole instrument, it can be gathered, from the terms thereof, that the party describes himself and acts as agent, and intends thereby

[1] Post, §§ 161, 162, note, 278, 422; Abbott on Shipp. Pt. 2. ch. 2, §§ 5–8 (ed. 1829); Id. Pt. 3, ch. 1, § 2; Id. Pt. 4, ch. 1, § 5 (6th ed. by Mr. Sergt. Shee, 1840); [Briggs *v.* Partridge, 64 N. Y. 357].

[2] Abbott on Shipp. Pt. 2, ch. 2, § 5.

[3] Post, §§ 422, 460, note; 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 1, pp. 506, 507 (5th ed.); Id. § 2, pp. 538–547; Dubois *v.* Delaware & Hudson Canal Co. 4 Wend. 285. But see Schack *v.* Anthony, 1 M. & Selw. 573. This case seems at variance with the doctrine maintained in Abbott on Shipping, and the case of Randall *v.* Van Vechten, 19 John. 60, and that of Dubois *v.* Delaware & Hudson Canal Co. 4 Wend. 285. It seems to me difficult to support the doctrine, if the principal is not a party to the sealed instrument, executed by the agent, and yet is bound by its obligations, that an action of assumpsit is not maintainable against him for a breach of his implied promise to perform the obligations thereof; and, *e converso*, that he may not maintain a like suit against the other contracting party for any breach of the implied obligations on his part. The decision in Schack *v.* Anthony, 1 M. & Selw. 573, is but a dry declaration of the rule, promulgated by the court without any reasoning in its support, and founded on no antecedent authorities. See also Moorson *v.* Kymar, 2 M. & Selw. 303; Post, §§ 273, 277, 278, 294, 422, 450 and note. See also Hall *v.* Bainbridge, 1 Mann. & Gr. 42.

to bind the principal, and not to bind himself.[1] Indeed, the doctrine, maintained in the more recent authorities, is of a far more comprehensive extent. It is, that if the agent possesses due authority to make a written contract, not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal be known, or unknown, he, the agent, will be liable to be sued, and be entitled to sue thereon, and his principal also will be liable to be sued, and be entitled to sue thereon in all cases,[2] unless from the attendant circumstances, it is clearly manifested, that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any

[1] Ante, § 147; Stackpole *v.* Arnold, 11 Mass. 27, 29. See also other cases, where the doctrine is laid down in this qualified manner, cited Ante, § 147, note; Rice *v.* Gove, 22 Pick. 158; Daniels *v.* Burnham, 2 Miller (La.), 244; Minard *v.* Reed, 7 Wend. 68; Pentz *v.* Stanton, 10 Wend. 271; Spencer *v.* Field, 10 Wend. 87.

[2] [Thus, where the landlord's agents gave to a tenant a written unsealed lease in their own names, adding the words "agents as landlord," it was held that the landlord could sue in his own name and recover rent. Nicoll *v.* Burke, 78 N. Y. 581; Schaeffer *v.* Henkel, 7 Abb. N. C. 1. So, in Huntington *v.* Knox, 7 Cush. 371, where an agent sold property of his principal and gave the purchaser a receipt in his own name, without stating his agency, it was held that the principal, on proving by parol his property, and the authority of the agent, could maintain an action in his own name for the balance of the purchase-money. Shaw, C. J. said: "Where the contract is made for the benefit of one not named, though in writing, the latter may sue on the contract, jointly with others, or alone, according to the interest. The rights and liabilities of a principal upon a written instrument executed by his agent do not depend upon the fact of the agency appearing on the instrument itself, but upon the facts, (1) that the act is done in the exercise, and (2) within the limits of the powers delegated, and these are necessarily inquirable into by evidence." Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326; Phelps *v.* Prothero, 32 Eng. L. & Eq. 474; Slawson *v.* Loring, 5 Allen, 340; Prather *v.* Ross, 17 Ind. 495; Kenyon *v.* Williams, 19 Ind. 44; Fuller *v.* Hooper, 3 Gray, 334; Lindus *v.* Bradwell, 5 Com. B. 583. And this rule seems to be well settled, except in the case of commercial paper. Lerned *v.* Johns, 9 Allen, 421; York Co. Bank *v.* Stein, 24 Md. 463. Thus, a bill of exchange drawn by an agent in his own name does not bind his principal, though made for his benefit and containing a direction to the drawee to charge the amount thereof to his account. Bank of Brit. No. America *v.* Hooper, 5 Gray, 567. So, a note signed "A. B. Ag't," without any reference to a principal, binds A. B. only, and the principal, when disclosed, cannot be sued thereon. Williams *v.* Robbins, 16 Gray, 77; Taylor *v.* Chicago, &c. R. R. Co., 74 Ill. 86. But in the case of Browning *v.* Prov. Ins. Co., of Canada, L. R. 5 P. C. 263, it was held that where an insurance broker takes out a policy of insurance in his own name upon his principal's goods, the latter may sue upon the policy in his own name. See also Prov. Ins. Co. of Canada *v.* Leduc, L. R. 6 P. C. 224. — Ed.]

event be had by or against the principal upon it.[1] The doctrine thus asserted has this title to commendation and support, that it not only furnishes a sound rule for the exposition of contracts, but that it proceeds upon a principle of reciprocity, and gives to the other contracting party the same rights and remedies against the agent and principal, which they possess against him.

§ 161. Admitting, then, the rule, usually laid down, to be generally true, that in order to bind the principal and to make him personally liable upon a written contract made by his agent, or to enable the principal to sue or to be sued thereon, it should be executed in his own name, and appear to be his own contract; yet, it must be equally admitted, that there are many qualifications of it and exceptions to it, as well established as the rule itself.[2] A few cases may be sufficient in this place (as the subject will necessarily

[1] This more comprehensive doctrine is very fully stated and expounded in Higgins *v.* Senior, 8 Mees. & Wels. 834, 845, which will be cited more at large hereafter (sect. 270). It is there said: "There is no doubt, that where such an agreement is made, it is competent to show, that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the statute of frauds. And this evidence in no way contradicts the written agreement. It does not deny that it is binding on those, whom, on the face of it, it purports to bind; but shows, that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal." Trueman *v.* Loder, 11 Adolph. & Ellis, 589; Post, §§ 269, 270, 272, 273–280, 395–400; Nelson *v.* Powell, 3 Doug. 410; Thomson *v.* Davenport, 9 B. & Cressw. 78; Cothay *v.* Fennell, 10 B. & Cressw. 671; Garrett *v.* Handley, 4 B. & Cressw. 664; Batemen *v.* Phillips, 15 East, 272; Higgins *v.* Senior, 8 Mees. & Wels. 834, 844; Jones *v.* Littledale, 6 Adolph. & Ellis, 486; Beebee *v.* Roberts, 12 Wend. 413; Taintor *v.* Prendergast, 3 Hill, 72, 73; Inhabitants of Garland *v.* Reynolds, 20 Me. 45; Taunton & South Boston Turnpike *v.* Whiting, 10 Mass. 327; Commercial Bank *v.* French, 21 Pick. 486, 491; Fisher *v.* Ellis, 3 Pick. 322; Fairfield *v.* Adams, 16 Pick. 381; New England Mar. Ins. Co. *v.* De Wolf, 8 Pick. 56, 61, 62. See also 2 Kent, Comm. Lect. 41, pp. 631, 632 (4th ed.), and note (*a*); Hopkins *v.* Lacouture, 4 Miller (La.), 66; Williams *v.* Winchester, 19 Martin, 24; Hyde *v.* Wolf, 4 Miller (La.), 236; Muldon *v.* Whitlock, 1 Cowen, 290; Porter *v.* Talcott, 1 Cowen, 359; Collins *v.* Butts, 10 Wend. 399; Sullivan *v.* Campbell, 2 Hall, 271; American Jurist for January, 1830, vol. 3, pp. 78–80; Edmond *v.* Caldwell, 3 Shepley, 340; Smith on Merc. Law, pp. 134–136 (3d ed. 1843); Hicks *v.* Whitmore, 12 Wend. 548; Hays *v.* Lynn, 7 Watts, 524; Small *v.* Attwood, 1 Younge, 407, 457. See Ford *v.* Williams, 21 How. 288. [See Dupont *v.* Mount Pleasant Ferry Co., 9 Richardson, 258; Colder *v.* Dobell, L. R. 6 C. P. 486.]

[2] Post, §§ 392–402.

occur in other connections hereafter[1]) to illustrate, not only the qualifications and exceptions to the general rule as to sealed instruments, but also the more liberal doctrine applicable to unsealed instruments. Thus, for example, a written contract made by a factor in his own name, for the purchase or sale of goods for his principal, will bind the principal, and he may sue and be sued thereon, exactly as if he were named in it; for it is treated as the contract of the principal, as well as that of the agent.[2] So, if an agent should

[1] Post, §§ 269, 270, 275, 276, 395–400.

[2] Ante, § 110; 3 Chitty on Com. & Manuf. 193, 210, 211; 1 Bell, Comm. §§ 212, 385, 386, 408, 409, 416 (4th ed.); Id. 490, 491, 494, 537, 558 (5th ed.); 2 Kent, Comm. Lect. 41, pp. 622, 624, 630 (4th ed.); 1 Liverm. on Agency, ch. 5, § 1, pp. 214, 217; Atkyns *v.* Amber, 2 Esp. 393; Snee *v.* Prescott, 1 Atk. 248; Morris *v.* Cleasby, 4 M. & Selw. 566; Allen *v.* Ayers, 3 Pick. 298; Taintor *v.* Prendergast, 3 Hill, 72; Commercial Bank *v.* French, 21 Pick. 486; Higgins *v.* Senior, 8 Mees. & Wels. 834; Post, §§ 269–275, 392–402. [So, on a written order to deliver property to "D. A. N., president of the Eastern Railroad Company," accepted by the drawee, the company may maintain an action in their own name, the consideration moving them. Eastern Railroad *v.* Benedict, 5 Gray, 561. Dewey, J., there said: "The only ground of objection to maintaining the present action is, that the acceptance of this order by the defendants created a liability on the same solely in favor of D. A. Neale, and one that could be enforced only by an action in his name. This is said to result from the nature of the draft accepted by the defendants. It is said that the name of the plaintiffs does not appear on the face of the paper, as the payees thereof; and that no oral evidence can be properly admitted to show that they were the real party in interest, and that D. A. Neale was merely their agent, contracting in their behalf.

"To a certain extent, and under some circumstances, the adjudicated cases seem to furnish abundant authority to the point, that where a contract is made with an agent, the principal may sue thereon in his own name. Thus, in Skinner *v.* Stocks, 4 B. & Ald. 437, it was held that an action might be maintained either in the name of the person with whom the contract was made, or in the name of the party really in interest. In Sims *v.* Bond, 5 B. & Adolph. 393, and 2 Nev. & Man. 614, Lord Chief Justice Denman says: 'It is a well-established rule of law that where a contract, not under seal, is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant, in the latter case, being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party.' In Paley on Agency (3d Am. ed.), 324, we find the same principle stated, that the principal may sue in his own name to enforce rights acquired by his agent in a course of dealing in his behalf. Angell & Ames on Corp. § 316, is to the same effect.

"We may assume it to be quite clear and well supported by authority, that in the case of oral contracts the principal may sue in his own name upon a contract made with his agent. It is equally well settled that the same rule applies to cases of sales by written bills, or other memoranda made by the agent, using his own name, and disclosing no principal. Huntington *v.* Knox,

procure a policy of insurance in his own name, for the benefit of his principal, the agent, as well as the principal,[1] may sue thereon;

7 Cush. 371; Edwards *v.* Golding, 20 Vt. 30; Hubbert *v.* Borden, 6 Whart. 79; Salmon Falls Manuf. Co. *v.* Goddard, 14 How. 454, 455. In Wilson *v.* Hart, 7 Taunt. 260, Park, J., says: 'It is the constant course to show by parol evidence whether a contracting party is agent or principal.' In Potter *v.* Yale College, 8 Conn. 60, Chief Justice Hosmer says: 'I admit the principle, that where an agreement is made with an agent, for the sole and exclusive benefit of his principal, the principal has the legal interest.'

"In the case of Beckham *v.* Drake, 9 Mees. & Wels. 79, this subject was much considered in the very full arguments of the counsel, as well as in the several opinions given by the members of the court; and the result was, that it was held, that the parties really contracting are the parties to sue in a court of justice, although the contract be in the name of another, and that this rule was to be applied, not only to oral contracts, but to cases of ordinary mercantile contracts in writing. Parke, B., says: 'The case of bills of exchange is an exception, which stands upon the law-merchant; and promissory notes another, for they are placed on the same footing by the statute of Anne.' 9 Mees. & Wels. 96.

"It is unnecessary, in the present case, to decide whether, upon a mere naked written promise, made with one person, without any reference in the instrument to an agency, the action upon proof of such agency in fact, might be maintained in the name of the principal. We are aware that it is contended that the promise is directly and exclusively a promise to D. A. Neale, and that the addition of 'president of the Eastern Railroad Co.' must be rejected as merely *descriptio personæ*. But this position, we think, is not maintainable. This written instrument may properly be held to disclose an agency, and to indicate enough to authorize an action in behalf of the railroad company, upon actual proof that the bargain was made on their account.

"The case of Commercial Bank *v.* French, 21 Pick. 486, strongly illustrates and sustains this view. That was an action on a promise to pay 'the cashier of the Commercial Bank;' and the objection taken was, that the action could only be maintained in the name of the cashier. But it was held, that such description sufficiently indicated the contract to be one in which the bank was the party in interest, and authorized to maintain the action in its own name. It is true that the promise was there made 'to the cashier,' and not to 'A. B., cashier of the Commercial Bank;' and some importance was given, in the opinion, to that circumstance; but the principle upon which the opinion was based would equally have applied to the case of a promise to 'A. B., cashier,' &c. It was said by the court, 'The principle is, that the promise must be understood according to the intention of the parties. If in truth it be an

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[1] [This doctrine is sustained by the recent English decisions. Browning *v.* Prov. Ins. Co. of Canada, L. R. 5 P. C. 263; Prov. Ins. Co. of Canada *v.* Leduc, L. R. 6 P. C. 224. But in Finney *v.* Bedford Com. Ins. Co., 8 Metc. 348, where a part-owner of a vessel effected insurance thereon in his own name only, it was held that an action could not be maintained on the policy in the name of all the owners, and the insuring owner can recover only the amount of his own loss. — Ed.]

for it is treated properly as a contract, to which the principal as well as the agent is a party.[1] So, if the master of a ship, by a written contract in his own name, should contract for or order

undertaking to the corporation, whether by a right or a wrong name, whether the name of the corporation or some of its officers be used, it should be declared on and treated as a promise to the corporation.'

"In Pigott *v.* Thompson, 3 Bos. & Pull. 141, where commissioners for draining certain lands were authorized to receive tolls, and the defendant had agreed in writing to pay 'to the treasurer of the commissioners' certain tolls, it was held, that the action was properly brought in the name of the commissioners.

"In the case of Trustees of Ministerial and School Fund in Levant *v.* Parks, 1 Fairf. 441, it was held, that a note of hand, made payable to an individual as treasurer of a corporation, might properly be sued in the name of the corporation; and in State *v.* Boies, 2 Fairf. 474, it was held, the action was properly brought in the name of the State of Maine upon a note given 'to James Irish, land-agent of Maine.' In the case of Garland *v.* Reynolds, 20 Me. 45, which was an action brought upon a note given 'to Enoch Huntington, treasurer of the committee of the surplus revenue,' it was held that the action might be maintained in the name of the town for which the committee were acting.

"In Vermont Central Railroad *v.* Clayes, 21 Vt. 30, an action upon a note of hand, payable to 'the Commissioners of the Vermont Central Railroad Company,' the consideration of which was a subscription for shares in that company, was maintained in the name of the company, to whom the note had been delivered by the commissioners. And in Rutland & Burlington Railroad *v.* Cole, 24 Vt. 33, upon a note of hand payable 'to the order of Samuel Henshaw, treasurer,' &c., it appearing by other evidence that Henshaw was treasurer of the corporation, and that the consideration of the promise proceeded from the corporation, the action was held well brought by them." Lerned *v.* Johns, 9 Allen, 419. — R.]

[1] Ante, §§ 109, 111; Post, §§ 272, 392–402; 3 Chitty on Com. & Manuf. 201; Wolff *v.* Horncastle, 1 Bos. & Pull. 323; Lucena *v.* Crawford, 3 Bos. & Pull. 98; De Vignier *v.* Swanson, 1 Bos. & Pull. 346, n.; Bell *v.* Gilson, 1 Bos. & Pull. 345; 2 Kent, Comm. Lect. 41, pp. 630, 631 (4th ed.); Marsh. on Ins. B. 1, ch. 8, § 3, pp. 311, 312 (2d ed.); 3 Chitty on Com. & Manuf. ch. 3, p. 212. In the case of the United States *v.* Parmele, 1 Paine's Cir. 252, Mr. Justice Livingston admitted, that the principal might sue, in case of a written contract of his factor. But *arguendo*, he expressed a doubt, whether he could sue on the instrument itself, as one to which he was a party. His language was: "But the court does not know, that such suit (by the principal) was ever sustained on the contract itself, when one in writing took place between the factor and vendor, in which the name of the principal did not appear. What use might be made of such a paper as evidence, is one thing. But, that a suit can be brought upon it in the name of any but a party to it, has not been shown; nor is it believed that such is the law." The doctrine, however, which is here doubted by the learned judge, is now very firmly established, as may be abundantly seen in the authorities cited, Ante, § 160 *a.* note, and Post, § 270, note, § 278. [And see Huntington *v.* Knox, 7 Cush. 375; McDonald *v.* Bear River Co., 13 Cal. 235.]

repairs, the owner may be sued therefor, as well as the master; and the contract will be treated as the several contract of each.[1] So, a bottomry bond, properly entered into by the master of the ship, in his own name, will bind the owner; and a charter-party, made by the master in his own name, or a bill of lading signed in his own name, in the usual course of the employment of the ship, will bind the owner.[2] It is true, that from a technical principle of the common law, the owner cannot be sued directly on a bottomry bond or a charter-party executed by the master under seal; because it is not the deed of the owner.[3] But the owner is, nevertheless, bound by it; and all the obligations and covenants contained in it are binding on him, although the form of the remedy against him may be different from what it is against the master.[4] It is not improbable that this liability of the principal was suggested by, if not derived from, the edicts of the Roman prætor, respecting the exercitorial action, and institorial action, which we have already had occasion to consider.[5]

§ 162. The true principle, however, upon which all these cases stand, undoubtedly is, that the principal authorizes the agent to contract in his own name, and thereby to bind the principal also; and then the common law acting upon the intention of the parties, makes the party who would be ultimately liable, immediately liable to the other, whenever its forms of proceeding will enable it to do so.[6] In this respect, there is a strong analogy to the jurisdiction

[1] Abbott on Shipp. Pt. 2, ch. 2, §§ 1–3 (ed. 1829); Ante, § 116; Post, § 294; James *v.* Bixby, 11 Mass. 36, 37; Ingersoll *v.* Van Bokkelin, 7 Cowen, 670.

[2] Abbott on Shipp. Pt. 2, ch. 2, §§ 1–3, 5–8 (ed. 1829); Ante, §§ 116–119; 3 Kent, Comm. Lect. 46, pp. 161–163 (4th ed.); 1 Bell, Comm. § 446–466 (4th ed.); Id. B. 3, Pt. 1, ch. 4, § 1, pp. 506, 507 (5th ed.).

[3] Ante, § 116; Abbott on Shipp. Pt. 2, ch. 2, § 5; Blood *v.* Goodrich, 9 Wend. 68; 3 Kent, Comm. Lect. 46, pp. 162, 163 (4th ed.); 1 Bell, Comm. § 482 (4th ed.); Id. p. 539 (5th ed.); Gardner *v.* Lachlan, 8 Sim. 126, 128; Meyer *v.* Barker, 6 Binn. 234; Pickering *v.* Holt, 6 Greenl. 160.

[4] Abbott on Shipp. Pt. 2, ch. 2, § 5 (ed. 1829); Id. Pt. 3, ch. 1, § 2; Schack *v.* Anthony, 1 M. & Selw. 573; Leslie *v.* Wilson, 3 Brod. & Bing. 171; 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 1, pp. 506, 507 (5th ed.); Ante, § 160; Post, §§ 162, 278, 294, 422, 450, note.

[5] Ante, §§ 36, 116, 117, 122; Post, § 163; Abbott on Shipp. Pt. 2, ch. 2; §§ 3, 11; Id. Pt. 3, ch. 1, § 2 (ed. 1829); Dubois *v.* Delaware & Hudson Canal Co. 4 Wend. 285; Randall *v.* Van Vechten, 19 John. 60.

[6] See Abbott on Shipp. Pt. 2, ch. 2, §§ 5–8 (ed. 1829); Id. Pt. 3, ch. 1, § 2; Higgins *v.* Senior, 8 Mees. & Wels. 834, 844; Ante, § 160 *a*, and note; Post, § 270, and note.

exercised by courts of equity, in cases of assignment of choses in action, where the debtor is made directly liable to the assignee, although he might not be so at law. The general interests of trade and commerce require this expansion of the law of agency; and the edicts of the prætor were unquestionably founded on this, as a matter of public policy; "facilius hoc in magistro, quam institore, admittendum propter utilitatem; dicendum tamen erit eo usque producendam utilitatem navigantium."[1] Indeed, it may be asserted as a general rule, that in all cases where an agent has contracted within the sphere of his agency, and the principal is not by the form of the contract bound at law, a court of equity will enforce it against the principal, upon principles *ex æquo et bono*.[2]

§ 163. The Roman law seems, however, in some of its juridical regulations, to have proceeded upon principles somewhat different from ours, as to actions by and against parties contracting through the instrumentality of agents. In general, the principal, although bound by the act of his agent, was not personally and directly liable to the other contracting party, nor could he enforce the contract against the latter.[3] The only direct remedy (*actio directa*) was between the immediate parties to the contract; that is, the agent and the other contractor. Thus Pothier states it as the undoubted rule (and he is confirmed by other civilians): "ex contractu procuratoris, actio regulariter procuratori et adversus procuratorem

[1] Dig. Lib. 14, tit. 1, l. 1, § 5.

[2] Clark's Ex'rs *v.* Van Reimsdyk, 9 Cranch, 153; Abbott on Shipp. Pt. 2, ch. 2, § 5 (ed. 1829); Id. Pt. 3, ch. 1, § 2; Ante, § 160, note; Dubois *v.* Delaware & Hudson Canal Co. 4 Wend. 285. It seems, that in Louisiana, a power executed by the agent in his own name, will bind his principal, when he acts in the business intrusted to him, and according to the power conferred; for in that law the liability of the principal depends upon the act done, not upon the form in which it has been executed. The only difference in that law is, that where the agent contracts in his own name he adds his own personal responsibility to that of the person who has empowered him. Hopkins *v.* Lacouture, 4 La. 64; Hyde *v.* Wolff, 4 La. 234. This seems also to be the rule of the foreign continental law; and Pothier lays it down as clearly the law of France. Pothier on Oblig. n. 82, 448; 2 Emerig. on Assur. ch. 4, § 12, pp. 465–467. It was also clearly the doctrine of the Roman law, in which, in such cases, the actio utilis institoria was allowed against the principal, and the actio exercitoria, against the owner, which are analogous to our suits in equity. Pothier on Oblig. n. 82, 447, 448; Dig. Lib. 14, tit. 3, l. 3, § 17; Pothier, Pand. Lib. 14, tit. 3, n. 17, 18; Dig. Lib. 14, tit. 1, l. 1, §§ 7–9, 12; Pothier, Pand. Lib. 14, tit. 1, n. 9–18; 2 Kent, Comm. Lect. 41, p. 630, note (*d*) (4th ed.); Ante, § 160; Post, §§ 163, note, 278, 422, 450.

[3] Post, §§ 261, 271, 425, 426.

quæritur; non autem domino, aut adversus dominum."[1] There were exceptions to the rule, as has been before intimated; but they were principally introduced by the prætor, as a matter of equity, and hence called *actiones utiles*, in which the contract of an agent would be enforced against his principal; as, for example, in cases of exercitors or owners of ships, by the *actio exercitoria*, and in other agencies of a common nature in trade, such as the *actio institoria* against shopkeepers, and others acting through agents (*institores* or *procuratores*), in favor of commerce.[2] And it would seem that in the modern nations recognizing the civil law as the basis of their jurisprudence, the like action (*actio utilis*) will generally lie by or against the principal upon the contract of his agent; and that it is competent for the agent to contract in his own name directly or in the name of his principal only. Such certainly is the law in Scotland and in France.[3] In cases of this sort where the agent contracts in the name of his principal, having due authority, the principal is directly bound, and the agent is not (in general) personally liable. But if the agent makes the contract for his principal in his own name, he incurs a personal responsibility, although there is an accessorial obligation on the part of the principal.[4]

[1] Pothier, Pand. Lib. 3, tit. 3, n. 9, 10; 1 Stair, Inst. by Brodie, B. 1, tit. 12, § 16; Erak. Inst. B. 3, tit. 3, § 43.

[2] Erak. Inst. B. 3, tit. 3, §§ 43, 46; 1 Stair, Inst. B. 1, tit. 12, §§ 16, 18, 19; Pothier, Pand. Lib. 3, tit. 3, n. 1, 2, 6, 9, 10, and note Ib. (3); Pothier on Oblig. n. 82, 448–450; Ante, § 117.

[3] 1 Stair, Inst. by Brodie, B. 1, tit. 12, § 16; Pothier on Oblig. n. 447, 448; Id. n. 74, 82. Pothier on Oblig. (by Evans), n. 82, speaking on this subject, says: "We contract through the ministry of another, not only when a person merely lends us his ministry, by contracting in our name, and not in his own, as when we contract by the ministry of a tutor, curator, agent, &c., in their quality as such. We are also deemed to contract by the ministry of another, though he contracts himself in his own name, when he contracts in relation to the affairs which we have committed to his management; for we are supposed to have adopted and approved, beforehand, of all the contracts which he may make respecting the affairs committed to him, as if we had contracted ourselves, and are held to have acceded to all the obligations resulting therefrom. Upon this principle is founded the actio exercitoria, which those, who have contracted with the master of a ship for matters relative to the conduct of such ship, have against the proprietor, who has appointed the master. Upon the same principle is founded the actio institoria, which those, who have contracted with the manager of a commercial concern, or a manufactory, have against the employer (le commettant), and the actio utilis institoria, which relates to contracts made with a manager of any other kind." Post, § 271.

[4] Pothier on Oblig. n. 447–449.

§ 164. Hitherto, for the most part we have been considering cases of pure agency, where the authority is unclothed with any real or apparent interest in the property itself. But where the authority is coupled with an interest in the property itself, there (as we have seen)[1] the authority over it may be, and, in general, properly is, executed in the name of the agent himself, and not in that of the principal. Perhaps some of the cases of factors, and masters of ships, and insurance agents, may be explained upon this broad principle; for they are in some cases clothed with a legal interest in the property, or the contract.[2] Thus, if the principal has clothed a factor with the legal title to the property, subject to his own equitable ownership, or has authorized the factor to sell it in his own name, there cannot be a doubt that he may so sell it; and the legal title will pass to the purchaser.[3] The master of a ship, too, who sells the ship or cargo, or a part thereof, in a case of necessity, generally sells it in his own name, and is presumed to be clothed with this superinduced authority in such extremities, by virtue of his office.[4] But the more common cases in which this principle is applied, are, where there is an authority coupled with an interest in mortgages and other conveyances of real or personal property to the grantee, in which is also contained an authority to the grantee to sell the property under certain circumstances. In such cases, the legal estate in the property being in the grantee, he is at liberty to sell it in his own name, and to confer thereby, under the circumstances contemplated by the conveyance, an absolute title to the purchaser.[5] But, where no interest whatever in the property is conveyed to the grantee of the authority, although the instrument is designed to be a security for debts due to him, the sale by the grantee, to bind the principal, must be in his name, and not in that of the grantee.[6]

[1] Ante, § 150; Post, §§ 399, 400; [Quinn *v.* Halbert, 52 Vt. 353].

[2] Ante, §§ 116, 150, 161; Post, §§ 278, 298, 299, 399–401.

[3] Post, §§ 397, 400, 401; Coates *v.* Lewes, 1 Camp. 444; Baring *v.* Corrie, 2 B. & Ald. 137; 3 Chitty on Com. & Manuf. ch. 3, pp. 205, 206; Martini *v.* Coles, 1 M. & Selw. 140, 147; Pickering *v.* Busk, 15 East, 38.

[4] The Gratitudine, 3 Rob. 257–263; The Schr. Tilton, 5 Mason, 481; Ante, §§ 116–118.

[5] See Hunt *v.* Rousmaniere's Adm'r, 2 Mason, 244; s. c. 3 Mason, 294; 8 Wheat. 174; s. c. 1 Pet. 1, 13; Ante, § 150; Post, §§ 399, 400; [Cranston *v.* Crane, 97 Mass. 459].

[6] Ibid.

§ 165. In the next place, let us consider, what in other respects will be held to be a good execution of the authority. And here it may be laid down as a general rule, that, in order to bind the principal (supposing the instrument to be in other respects properly executed), the act done must be within the scope of the authority committed to the agent.[1] In other words, his authority or commission must be punctiliously and properly pursued; and its limitations and extent duly observed, although a circumstantial variance in its execution will not defeat it.[2] If the act varies substantially (and not merely in form) from the authority or commission in its nature, or extent, or degree, it is void, as to the principal, and does not bind him.[3] Of course, this doctrine is to be taken with an exception of the cases of a general authority, where there are secret instructions limiting it, to which our attention has been already directed.[4] Thus, for example, if an agent is authorized to do an act upon condition, and he does it absolutely; or, *vice versâ*, if he is authorized to do an act absolutely, and he executes it upon condition, — in such cases the act will not bind the principal.[5]

[1] Ante, §§ 126–133.

[2] Com. Dig. *Attorney*, C. 15; North River Bank *v.* Aymar, 3 Hill, 262; Nixon *v.* Hyserott, 5 John. 58; Batty *v.* Carswell, 2 John. 48.

[3] Com. Dig. *Attorney*, C. 11, 14, 15; North River Bank *v.* Aymar, 3 Hill, 262; Nixon *v.* Hyserott, 5 John. 58; Batty *v.* Carswell, 2 John. 48. [Thus, where the agent of a corporation was authorized to borrow money from a bank, and to execute the note of the corporation therefor, and he borrowed the money and executed a bond therefor under the seal of the corporation, it was held that he had exceeded his authority, and that his principal was not liable on the bond. First Nat. Bank *v.* Gay, 63 Mo. 33; Mayor and Aldermen of Little Rock *v.* State Bank, 3 Ark. 227. So, where an agent had authority to collect debts, it was held that this gave him no power to release a debt, and that his principal was not bound by such release, Herring *v.* Hottendorf, 74 N. C. 588: and it has also been held that a corporation is liable for the negotiable instruments made by its agents, only when they keep within the limits of their authority, Silliman *v.* Fredericksburg R. Co., 27 Grat. 119: so, where an agent for the sale of land was instructed to sell for one third cash, a contract made by him to sell without a strict compliance with that condition cannot be enforced against his principal, Wanless *v.* McCandless, 38 Ia. 20; Baxter *v.* Lamont, 60 Ill. 237; Meade *v.* Brothers, 28 Wisc. 689: so, a master is not liable for meat bought by his servant on credit, where he has only authorized him to buy for ready money, Stubbings *v.* Heintz, 1 Peake, N. P. 66. See Fougue *v.* Burgess, 71 Mo. 389; Kelly *v.* Fall Brook Coal Co., 4 Hun (N. Y.), 261; Abrahams *v.* Weiller, 87 Ill. 179. But, *contra*, Broadway Savings Bank *v.* Vorster, 30 La. Ann. 587. — Ed.]

[4] Ante, §§ 73, 126–133; Pothier on Oblig. n. 79; Tradesman's Bank *v.* Astor, 11 Wend. 87.

[5] Co. Litt. 258 b; Com. Dig. *Attorney*, C. 13, 14; Howard *v.* Baillie, 2 H. Bl. 623.

On the other hand, if a general discretion is reposed, the act of the agent, however indiscreet, becomes obligatory, unless, indeed, there is such gross misconduct, as amounts to a fraud upon the principal, and that misconduct is known to the person contracting with the agent.[1]

§ 166. But the question may often arise, whether an act is wholly void, or not, when the agent does more than he is authorized to do, or less than he is authorized to do. There are some distinctions on this subject, which deserve to be examined, not because they present any diversity in the general principle, but because they present some diversity in the application of it. Lord Coke has laid down the rule in the following terms: "Regularly, it is true that, where a man doth less than the commandment or authority committed unto him, there, the commandment or authority being not pursued, the act is void. And, where a man doeth that, which he is authorized to do, and more, there it is good for that, which is warranted, and void for the rest. Yet both these rules have divers exceptions and limitations."[2] And Lord Coke is well warranted in suggesting, that there are exceptions and limitations. Where there is a complete execution of the authority, and something *ex abundanti* is added, which is improper, there the execution is good, and the excess only is void. But where there is not a complete execution of a power, or where the boundaries between the excess and the rightful execution are not distinguishable, there the whole will be void.[3]

§ 167. Some illustrations of this doctrine may, perhaps, be useful. Thus, if a man has a power to settle a jointure upon his wife for life, and he should execute it by an appointment for ninety-nine years, if she should so long live, even if it would be a void execution of the power at law, it would be upheld in equity *pro tanto*. For in such a case he has done less than his power, and the boundaries are clear and distinguishable; for if the wife should outlive the ninety-nine years, the estate, for the residue of her life would be undis-

[1] Ante, §§ 73, 127–133.

[2] Co. Litt. 258 a; Com. Dig. *Attorney*, C. 15.

[3] Harg. note (202) to Co. Litt. 258 a; Alexander *v.* Alexander, 2 Ves. 644; Com. Dig. *Attorney*, C. 15. Mr. Sugden, in his work on Powers, has considered this subject at large, with reference to powers of appointment and the execution of powers under the statute of uses. See Sugden on Powers (3d ed.), ch. 5, per tot., and especially §§ 7 and 8 of the same chapter. Id. ch. 6, §§ 7 and 8 (6th ed.), pp. 373–456; [Baxter *v.* Lamont, 60 Ill. 237].

posed of.[1] So, if the power were to lease for twenty-one years, and the party should make a lease for forty years, it would be a good execution of the power in equity, although not at law, for the twenty-one years, and void as to the residue; for it distinctly appears how much he has exceeded it.[2] So, if a power of appointment is executed in definite proportions among persons who are objects of the power, and others who are mere strangers, it will, in many cases, be good as to the proper objects, and void as to the strangers, because the excess is clearly ascertained; and the donee of the power shall not be allowed, by his own wrongful act, to defeat the rightful execution *pro tanto*.[3] And where a distinct limitation or appointment is made according to the power, and another distinct limitation or appointment is made in the same instrument, exceeding the power, the former will be good even at law, and the latter will be held void.[4]

§ 168. Upon the same ground, if a warrant of attorney is given to make livery to one person, and the attorney make livery to two; or if the authority is to make livery of Blackacre, and the attorney makes livery of Blackacre and Whiteacre, the execution is good, so far as it is authorized by the power, and void as to the residue;[5] for the excess is clearly ascertainable. So, if a letter of attorney be to make livery absolutely, and the attorney make it upon condition, this is a good execution of the power, and amounts to a sufficient livery, and the condition is void.[6] But the contrary would be true, if the livery were to be made upon condition, and the attorney were to make it absolute;[7] or, if it were to make livery to two, and he made it to one only.[8]

[1] Alexander *v.* Alexander, 2 Ves. 644; Post, § 173.

[2] Alexander *v.* Alexander, 2 Ves. 644; Sugden on Powers, ch. 5, § 8, pp. 549, 550 (3d ed.); Id. ch. 9, § 1, vol. 2, pp. 59–79 (6th ed.); Campbell *v.* Leach, Ambl. 740; Jenkins *v.* Kemishe, Hardres, 395; Roe *v.* Prideaux, 10 East, 158; Dig. Lib. 17, tit. 1, l. 33.

[3] Sugden on Powers (3d ed.), ch. 5, § 8, pp. 546–549; Id. ch. 9, § 1, vol. 2, pp. 59–79 (6th ed.); Adams *v.* Adams, Cowp. 651.

[4] Sugden on Powers (3d ed.), ch. 5, § 8, pp. 550–556; Id. ch. 9, § 1, vol. 2, pp. 69–79 (6th ed.); Commons *v.* Marshall, 6 Bro. Parl. C. 168.

[5] Perkins on Convey. n. 189. [6] Perkins on Convey. n. 188, 189.

[7] Perkins on Convey. n. 188; Co. Litt. 258 a.

[8] 2 Roll. Abridg. *Feoffment*, p. 9, l. 50. See also Dig. Lib. 45, tit. 1, l. 1. § 5. A case somewhat analogous to some of the foregoing is put in the Roman law. Si mihi Pamphilum stipulanti, tu Pamphilum et Stichum spoponderis; Stichi abjectionem pro supervacuo habendam puto. Nam si tot sunt stipulationes quot corpora; duæ sunt quodammodo stipulationes, una utilis, alia inutilis. Neque vitiatur utilis per hanc inutilem. Dig. Lib. 45, tit. 1, l. 1, § 5.

§ 169. Upon the same ground, if an agent were authorized to procure insurance upon a ship for two thousand dollars, and he should procure a policy for two thousand dollars on the ship, and two thousand dollars on the cargo, the policy would be held good as to the ship, and void as to the cargo, at least unless under special circumstances.[1] On the other hand, if an agent were authorized to sign a note for his principal, payable in six months, and he should sign one payable in sixty days, it would be utterly void.[2] So, if an agent were authorized to purchase goods on a credit of three and six months, and to give notes accordingly in the name of the principal; and he were to purchase the goods and give notes payable at four and five months, it would be utterly void, since in neither respect is it in conformity to the authority, as to the time of credit given to the principal, although the credit may possibly be equally beneficial to him; for, as to that, the agent has no right to judge.[3]

§ 170. The general principle, which pervades all these cases, is the same; that the principal is not bound by the unauthorized acts of his agent, but is bound where the authority is substantially pursued, or so far as it is distinctly pursued. But the question may often arise, whether, in fact, the agent has exceeded what may be deemed the substance of his authority. Thus, if a man should authorize an agent to buy one hundred bales of cotton for him, and he should buy fifty at one time of one person, and fifty at another time of a different person; or if he should buy fifty only, being unable to purchase more at any price, or at the price limited; the

[1] [Where an agent was authorized to draw a bill at four months and drew one payable in less time, but antedated it, making it apparently drawn according to his authority, the principal was not liable, Tate *v.* Evans, 7 Mo. 419: and so, where the agent was authorized to sign his principal's name to a note for a specified sum, it was held that the payee was charged with knowledge of the extent of his authority, and his principal was not liable on a note for a larger sum than he had authorized, Blackwell *v.* Ketcham, 53 Ind. 184: so, an authority to sell a colt does not authorize an agent to put a mortgage upon it, Switzer *v.* Wilvers, 24 Kans. 384: and an authority to subscribe for a certain amount of railroad stock upon the location and completion of certain improvements, will not authorize a subscription upon the location of such improvements only, Drover *v.* Evans, 59 Ind. 454. So, where an insurance broker was authorized to underwrite in the name of his principal a policy not exceeding a certain sum, and he did so for a larger sum, it was held that the contract was indivisible and the policy void. Baines *v.* Ewing, 4 H. & C. 511. See Bennett *v.* City Ins. Co., 115 Mass. 241; Smith *v.* Stephenson, 45 Iowa, 645. — Ed.]

[2] Batty *v.* Carswell, 2 John. 48; Dig. Lib. 45, tit. 1, l. 1, § 4.

[3] Post, §§ 175–178; Instit. Lib. 3, tit. 27, § 8.

question might arise, whether the authority was well executed. In general, it may be answered that it was; because, in such a case, it would ordinarily be implied, that the purchase might be made at different times, of different persons; or that it might be made of a part only, if the whole could not be bought at all, or not within the limits prescribed.[1] So, if a commission to an agent were to purchase fifty shares of the stock of a bank, and the agent should contract with one person, who is the owner of thirty shares, for the purchase of that number, intending to buy the remaining twenty shares from some other person, the principal would be bound by that contract, although the agent should afterwards fail in his attempts to buy the remaining twenty.[2] So, if a merchant should direct his correspondent to procure insurance for him of two thousand dollars upon a particular voyage, for a particular ship, and, after one underwriter had subscribed one thousand dollars, the others should decline the risk; in such a case, the authority would be well executed for the one thousand dollars, and the principal would be bound to pay the premium.[3] So, if the principal should authorize his agent to become surety in a certain sum for him, and he should become surety in a less sum, it has been thought that the principal would be bound by the stipulation; and such, indeed, is the rule of the Roman law.[4]

§ 171. But cases may arise, in which it would be as manifest from the objects of the purchase, that the whole or no part of the property was to be bought, and even bought of the same person. As for example, if a person should authorize his agent to buy a ship, it would be presumed that a purchase of the whole, and not of a part, was intended; for the convenient use of a ship may be most materially impaired by a divided ownership; and, perhaps, the whole objects of the purchase would thereby be defeated.[5] The same rule would apply to the case of a commission or authority to buy a plantation. It would not be a good execution of the commission to buy a part thereof only, or to buy an undivided share

[1] Dig. Lib. 17, tit. 1, l. 33; [Ireland *v.* Livingston, L. R. 5 H. L. 395; Johnston *v.* Kershaw, L. R. 2 Ex. 82; McDermid *v.* Cotton, 2 Ill. App. 297].

[2] 2 Kent, Comm. Lect. 41, pp. 618, 619 (4th ed.).

[3] Dig. Lib. 17, tit. 1, l. 33.

[4] Post, § 174; Dig. Lib. 17, tit. 1, l. 33; Pothier, Pand. Lib. 17, tit. 1, n. 46. [See also Gordon *v.* Buchanan, 5 Yerger, 811; Lathrop *v.* Harlow, 23 Mo. 213.]

[5] Post, § 180.

of it, or any interest in it less than the fee. In all such cases, it would generally be presumed, that the entirety of the property constituted an essential element in the purchase.[1] But of this more hereafter.[2]

§ 172. The true inquiry, therefore, in all such cases, is, what, under all the circumstances, is the true nature and limits of the authority. If it is exceeded in any substantial manner, it will not be obligatory on the principal.[3] Let us suppose a case where A. should authorize B. to purchase ten bales of cotton at ten cents per pound; and B. should purchase the ten bales at eight cents per pound; no one would doubt, that the purchase would be binding upon the principal; because the meaning of the parties is presumed to be, that the price should not exceed the ten cents. In such a case, the maxim may well apply, "Omne majus in se continet minus. Majori summæ minor inest."[4] But if B. should, in such a case, purchase at twelve cents, the purchase would not be binding on the principal, or at least, not binding unless B. should offer the bales of cotton to A. for the price of ten cents.[5] In the former case, the bargain would be advantageous to the principal; in the latter case it would be injurious; and the law will construe the intention favorably in the case, where the less price is given, because it is for the advantage of the principal, and must be presumed to have been within the scope of the authority; but it will never construe it to have been the intention of the principal to allow the agent to exceed the authority given to him, when it is to his disadvantage.[6]

§ 173. Upon somewhat similar grounds of the apparent intention, an agent, who has not a mere authority, but has an authority coupled with an interest, may do less than the terms of his authority seem directly to warrant, and yet bind his principal.[7] Thus, if in England a copyholder for life has a license to lease for five years, he may lease for three years; for it will be presumed, that the

[1] Post, §§ 176, 177.

[2] Post, §§ 175–178.

[3] Ante, § 165.

[4] Instit. Lib. 3, tit. 27, § 8; 2 Kent, Comm. Lect. 41, 617, 618 (4th ed.); Post, §§ 174, 176.

[5] Pothier on Oblig. n. 77, 78; Co. Litt. 258 a; Dig. Lib. 17, tit. 1, l. 33; 1 Domat, B. 1, tit. 15, § 3, art. 6, 7; 2 Kent, Comm. Lect. 41, pp. 617–619 (4th ed.); Just. Inst. Lib. 3, tit. 27, §§ 8, 9.

[6] Ibid.; Post, § 175.

[7] See Ante, § 164; Post, § 489.

authority was limited in its extent to the duration of five years, and comprehended any intermediate period.[1] So, a license to a copyholder for life to lease for five years, if he should so long live, will be well executed by a lease for five years, omitting, if he should so long live; for the law will imply the limitation in such a case.[2]

§ 174. The Roman law adopted similar distinctions. The general rule in that law was (as we have already seen), that the limits of the authority must be strictly observed.[3] If an authority was given to buy at a limited price, that price could not lawfully be exceeded. "Diligenter igitur fines mandati custodiendi sunt. Nam qui excessit, aliud quid facere videtur.[4] Præterea in causa mandati etiam illud vertitur, ut interim nec melior causa mandantis fieri possit; interdum melior; deterior vero nunquam.[5] Melior autem causa mandantis fieri potest, si, cum, tibi mandassem, ut Stichum decem emeres, tu eum minoris emeris; vel tantidem, ut aliud quicquam servo accederet; utroque enim casu, aut non ultra pretium, aut intra pretium fecisti.[6] Et quidem si mandavi tibi, ut aliquam rem mihi emeres nec de pretio quidquam statui, tuque emisti, utrimque actio nascitur."[7] But the Roman lawyers were divided in opinion, whether, if the stipulated price was exceeded, the principal was bound if the agent offered to remit the excess. However, the better opinion was that maintained by Proculus, that, in such case, the principal was bound.[8] "Quod, si pretium

[1] Com. Dig. *Attorney*, C. 12, 15; 1 Roll. Abridg. *Authority*, G. 1, l. 47; Ante, § 167.

[2] 1 Roll. Abridg. *Authority*, G. 2, l. 50; Com. Dig. *Attorney*, C. 15; Ante, § 167.

[3] Ante, §§ 43, 70.

[4] Ante, § 70; Dig. Lib. 17, tit. 1, l. 5; Pothier, Pand. Lib. 17, tit. 1, n. 41. The Institutes say (Lib. 3, tit. 27, § 8), Is, qui exequitur mandatum, non debet excedere fines mandati. Ante, §§ 43, 70.

[5] Dig. Lib. 17, tit. 1, l. 3; Pothier, Pand. Lib. 17, tit. 1, n. 49; Just. Inst. Lib. 3, tit. 27, §§ 8, 9.

[6] Dig. Lib. 17, tit. 1, l. 5, § 5; Pothier, Pand. Lib. 17, tit. 1, n. 48; Just. Inst. Lib. 3, tit. 1, 27, § 8; 1 Domat, B. 1, tit. 15, § 3, art. 6.

[7] Dig. Lib. 17, tit. 1, l. 3, § 1.

[8] 2 Kent, Comm. Lect. 41, p. 618 (4th ed.); 1 Liverm. on Agency, ch. 5, § 1, pp. 98, 99 (ed. 1818); Just. Inst. Lib. 3, tit. 27, § 8. Mr. Livermore thinks that the same rule prevails in our law; and he puts the case thus: "If I have directed my agent to cause insurance to be effected for me, and he pays a higher premium than that prescribed by the order, the commission will be well executed, the excess being a charge upon him." Ibid. And he cites a case from Valin, Comm. Tome 2, Liv. 3, tit. 6, *Des Assur.* art. 3, to that effect. Perhaps it may not be quite certain that our law would decide this case in the same way, al-

statui, tuque pluris emisti, quidam negaverunt, te mandati habere actionem, etiam si paratus esses, id, quod excedit, remittere: namque iniquum est, non esse mihi cum illo actionem, si nolit; illi vero, si velit, mecum esse.[1] Sed Proculus recte eum, usque ad pretium statutum, acturum existimat; que sententia sane benignior est."[2] Again: "Rogatus, ut fidejuberet; si in minorem, summam se obligavit, recte tenetur. Si in majorem, Julianus verius putat, quod a plerisque responsum est, eum, qui majorem summam, quam rogatus erat, fidejussisset, hactenus mandati actionem habere, quatenus rogatus esset; quia id fecisset, quod mandatum ei est; nam usque ad eam summam in quam rogatus erat, fidem ejus spectasse videtur qui rogavit."[3]

§ 175. But the mere fact, that the bargain which is made will be more beneficial for the principal, will not avail the agent if it be different from the substance of the authority.[4] Thus, if A. authorizes B. to purchase a particular house at a certain price, and B. purchases another house at a lower price, which is really a better house, still A. is not bound thereby; for the estate is not that which was authorized to be bought. "Si mandavero tibi, ut domum Sejanam centum emeres, tuque Titianam emeris longé

though the decision is full of equity. It might be difficult to say, that the principal could insist upon his right to adopt the policy made contrary to his orders, without ratifying it *in toto*. And, on the other hand, it might be difficult to say, that the agent could compel the principal to adopt any indivisible contract of this nature, made contrary to his orders, by a remission of part of the premium. See Pindley *v.* Breedlove, 16 Martin, 105. Mr. Chancellor Kent, however, is of opinion (and his opinion is deservedly of very great authority) that the decree of the French court was right, and that the defence was unjust. 2 Kent, Comm. Lect. 41, p. 618 (4th ed.). [Those Roman lawyers who were opposed to the opinion of Proculus held that the principal was not bound, even if the agent offered to remit the excess, because the contrary rule would leave the principal at the agent's mercy. The agent having authority to purchase merchandise at one hundred pieces of gold, might purchase at one hundred and one, and, if the merchandise proved to be a good bargain, he might then say he bought for himself, and not for his principal, and keep it for his own: but, if it proved to be a bad bargain, he might throw it upon his principal, at a loss to himself of a single piece of gold; thus taking to himself the whole chance of profit, and making his principal his insurer against a loss beyond a single piece of gold. — G.]

[1] Dig. Lib. 17, tit. 1, l. 3, § 2; Pothier, Pand. Lib. 17, tit. 1, n. 45; 1 Stair, Inst. by Brodie, B. 1, tit. 12, § 9.

[2] Dig. Lib. 17, tit. 1, l. 4, and l. 5, § 3, l. 33; Pothier, Pand. Lib. 17, tit. 1, n. 45, 46; Just. Inst. Lib. 3, tit. 27, § 8; 1 Domat, B. 1, tit. 15, § 3, art. 7.

[3] Dig. Lib. 17, tit. 1, l. 33; Pothier, Pand. Lib. 17, tit. 1, n. 46.

[4] Ante, § 170.

majoris pretii centum tamen, aut, etiam minoris non videris implesse mandatum."[1]

§ 176. Upon a broader ground, any deviation from the authority which would defeat the manifest inducements of the principal to make the purchase, would be void, whether the bargain were beneficial or not. Therefore, if an authority is given to purchase a house with an adjoining wharf and store, and the agent should buy the house only, although at an advantageous bargain, the principal would not be bound to take the house, especially if the wharf and store constituted an apparent inducement to the purchase.[2] So, if an agent were authorized to purchase a certain farm in fee, and he should purchase an interest for life, or for years, or an undivided right or share of one tenant in common therein, the principal would not be bound thereby; for it would be presumed, that the main inducement to the purchase was the purchase of the entirety of the estate and title.[3] It would be an abuse of the meaning of the maxim, "Majori summæ minor inest," to apply it to such cases.[4] So, if the principal should authorize the agent to purchase a house for him, it would not be a proper execution of the authority to purchase a part of the house only; for, it must be presumed, unless the contrary should appear, that the principal intended the purchase of the whole house, and not of a part only.[5] But if the whole house were purchased, it would not make any difference as to binding the principal, that it was purchased in parts of the different owners.[6]

§ 177. However, in the case of an authority to purchase a farm or tract of land, owned and sold in parts, it seems, that by the Roman law a purchase of a part would be within the authority, unless there was a plain restriction, that the whole should be purchased or none. At least, so the Digest seems to import: "Quod si fundum, qui per partes venit, emendum tibi mandassem, sed ita, ut non aliter mandato tenear, quam si totum fundum emeres, si totum emere non potueris, in partibus emendis tibi negotium gesseris;

[1] Dig. Lib. 17, tit. 1, l. 5, § 2; Pothier, Pand. Lib. 17, tit. 1, n. 43; Pothier on Oblig. n. 78.

[2] 2 Kent, Comm. Lect. 41, pp. 618, 619 (4th ed.).

[3] Ibid.

[4] Ante, § 172.

[5] Dig. Lib. 17, tit. 1, l. 36, § 2; Pothier, Pand. Lib. 17, tit. 1, n. 44; Pothier, Traité de Mandat, n. 95; Ante, § 171.

[6] Dig. Lib. 17, tit. 1, l. 35, 36, §§ 1, 2; Pothier, Pand. Lib. 17, tit. 1, n. 44; Post, § 177.

sive habueris in eo fundo partem, sive non; et eveniet, ut is, cui tale mandatum datum est, periculo suo interim partes emat; et nisi totum emerit, ingratus, eas retineat.[1] Quod si mandassem tibi, ut fundum mihi emeres, non addito eo, ut non aliter mandato tenear, quam si totum emeres; et tu partem, vel quasdam partes ejus emeris; tum habebimus sine dubio invicem mandati actionem, quamvis reliquas partes emere non potuisses."[2]

§ 178. The ground of this distinction is not very apparent. But it probably may have rested upon the presumption, that where the house or land is owned and to be sold in parts, the authority ought, in the absence of all controlling restrictions, to be treated as an authority to purchase the parts in severalty, as far as the agent can. In our law, it is most probable, that the construction would ordinarily be the other way, unless under peculiar circumstances; as, where the purchaser was already a part-owner of the house or land; and the object might fairly be presumed to be to enlarge his interest in it, by purchasing the shares of the other part-owners, as he might be able, from time to time.

§ 179. Similar considerations would apply to the converse case, where an agent is authorized to sell the land of his principal; for a sale of a part at one time, and a sale of another part at another

[1] Dig. Lib. 17, tit. 1, l. 36, § 2; Pothier, Pand. Lib. 17, tit. 1, n. 44; Pothier, Traité de Mandat, n. 95; 2 Kent, Comm. Lect. 41, pp. 618, 619 (4th ed.).

[2] Dig. Lib. 17, tit. 1, l. 36, § 3; Pothier, Pand. Lib. 17, tit. 1, n. 44. Mr. Livermore has stated the whole of this doctrine with singular clearness and accuracy, and supposes it to be coincident with our law. "Therefore," says he, "if I have commissioned you to buy for me a certain plantation, and you have bought a part of it only, this purchase, which you have made in my name, will not be obligatory upon me; for this business is of an entire nature; and although I might have a desire to be the owner of the entire plantation, yet its value may be very much lessened, or in my estimation lost, by a division of it. If, however, when I employed you to purchase this plantation, I knew, that it was owned by several tenants in common, who proposed to sell their interests separately, I shall be bound by your contracts if you have purchased the estate of some of the tenants in common, but have not been able to purchase of the others; unless there were an express provision, that I should be obliged only in case of all the estates being purchased. It is the same thing, if the estate, which the agent has obtained is less than that which he was authorized to purchase. As, if I have given you an authority to purchase for me the estate of J. S. in a certain dwelling-house, of which he has the fee-simple, and you procure me a lease for life, or a term of years; this will not be in pursuance of your authority." 1 Liverm. on Agency, ch. 5, § 1, pp. 100, 101 (ed. 1818).

time, might, in some cases, be deemed good, and in others be deemed bad, according to the just presumption of intent, and the consideration, whether a partial sale would be injurious, or not, to the sale of the residue. Thus, for example, if A. should, by his will, devise all his lands to be sold, it might be a good execution of the authority, to sell a part at one time, and a part at another.[1] So, if there be a feoffment of different parcels of land, with a letter of attorney to make livery thereof, the attorney may make livery of a part thereof at one time, and for a part thereof at another time.[2] So, if A. should authorize his agent to sell all his houses and lands in a particular place, where he owned divers distinct houses and tracts of land in severalty, a sale of one house or tract at one time, and the sale of another house or tract at another, would, or at least might, be good. But a sale of an undivided portion of any one house or tract of land would hardly be deemed justified by the power, from its apparent tendency to injure the sale of the residue, and to diminish the value of the residue, even to the owner himself.

§ 180. In cases of mercantile sales of personal property, a very liberal construction of the authority would, undoubtedly, be generally, although perhaps not universally, adopted.[3] Thus, if A. should consign a cargo of goods to B. for sale; there could be no doubt that B. might sell different parcels thereof to different persons, and at different times; and the sales would be held, by impli-

[1] Com. Dig. *Attorney*, C. 15; Co. Litt. 113 a.

[2] Com. Dig. *Attorney*, C. 15; Battey *v.* Trevillion, Moore, 278, 280. It was held, in Corlies *v.* Widdifield, 6 Cowen, 181, that, if a factor has the goods of different principals for sale on credit, he may sell the whole to one purchaser, and take his note, payable to himself, for the aggregate amount, and it will not be a violation of his duty. But that case had some peculiarities in it, affecting the general doctrine so laid down. And it may deserve much consideration, whether uniting in one note the claims of different principals might not materially affect the rights of each. The court in that very case, seemed to be of opinion that, at least under some circumstances, the act might have been a violation of duty. See Jackson *v.* Baker, 1 Wash. Cir. 395, 445; Ante, § 38, note. In Johnson *v.* O'Hara, 5 Leigh (Va.), 456, it was proved to be the usage in Petersburg, Va., for a commission merchant not only to sell on credit, but to take one note for the goods sold for different persons, payable to himself or order, and that he might procure such note to be discounted in his own name. But in so procuring the note to be discounted, the court held that he made it his own, and was liable for the proceeds to his principal, although the maker of the note had failed. Post, §§ 204 *a*, 205.

[3] Ante, §§ 60, 73, 74, 82; [Bosseau *v.* O'Brien, 4 Biss. 395; Bissell *v.* Terry, 69 Ill. 184].

cation, fairly within the scope of the authority. This is the known usage of trade; and it would probably be adopted as a just rule of interpretation of the authority, independent of any known usage in the particular place of sale. But, if an agent were authorized to sell a ship, it would, upon grounds of inconvenience, be presumed that a sale of the whole, and not of a part only, was authorized; because the use of the ship for beneficial purposes might (as has been already intimated) be greatly embarrassed by a divided ownership.[1]

§ 181. Where an agent has a general authority to receive payment of a debt, he is ordinarily bound to receive the whole of it in money only; for that is the only way which will enable him completely to discharge his duty to his principal.[2] But circumstances may vary this duty. As, for example, if he is a creditor of his principal, and the latter has authorized him to deduct from the sum received the amount due to himself, it will be sufficient for the agent to receive the balance in cash which will remain due to the principal after deducting the sum due to himself; and as to the other part of the debt, he may settle it with the debtor as he pleases, provided he gives credit therefor to the principal; since it can make no difference to his principal how it is received, or whether it is ever received by the agent or not.[3]

§ 182. Secondly. What is the degree of diligence required of agents in the proper exercise of their functions? The doctrine upon this subject is often laid down in very loose and indeter-

[1] See 1 Liverm. on Agency, ch. 5, § 1, pp. 99, 100 (ed. 1818); Ante, § 171. Mr. Lloyd, in his edition of Paley on Agency, has, in his note to pp. 179, 180 (note *n.*), said, that inquiries as to the due execution of powers on this point (of doing more or less than the power directs), "can have little place in mercantile questions, where the act done is, for the most part, indivisible." It is apparent, from what is said in the text, that this remark, in its general latitude, is incorrect, if not unfounded.

[2] Ante, §§ 98, 103, 109, and note; Post, §§ 215, 413, 429, 430, and note.

[3] Barker *v.* Greenwood, 2 Younge & Coll. 419, 420; Stewart *v.* Aberdein, 4 Mees. & Wels. 211, 228; Post, § 413, note. [But the fact that the principal has on two occasions sanctioned payments to his agent, of a pipe and a watch and chain, and charged the same to the agent's account, for debts which the agent had authority to collect in money only, will not authorize the agent to sell any property of his principal and take in payment a piano. Bertholf *v.* Quinlan, 68 Ill. 297. So, in Aultman *v.* Lee, 43 Iowa, 404, where the agent sold a threshing-machine and took wheat in part payment therefor, agreeing to account therefor to his principal, it was held that the principal was not bound to accept anything but money. See Drain *v.* Doggett, 41 Iowa, 682. — Ed.]

minate terms. It is often said, that an agent is bound to use the utmost care and diligence in the execution of his trust.[1] So, in the Roman law, terms equally indeterminate are often used. Thus, it is said, in the Digest, that some contracts make the party liable for deceit only; some both for deceit and neglect. Nothing more than responsibility for deceit is demanded in deposits, and precarious possessions, or possessions at will. Both deceit and neglect are inhibited in mandates, lending for use, custody after sale, taking in pledge, hiring, also in portions, guardianships, and voluntary services.[2] Among these some require (even more than ordinary) diligence. "Contractus quidam dolum malum duntaxat recipiunt; quidam, et dolum et culpam. Dolum tantum, depositum et precarium; dolum et culpam, mandatum, commodatum, venditum, pignori acceptum, locatum, item dotis datio, tutelæ negotia gesta. In his quidam et diligentiam."[3] And, again, it is said, after enumerating other contracts: "Sed ubi utriusque utilitas vertitur, ut in empto, ut in locata, ut in dote, ut in pignore, ut in societate, et dolus et culpa præstatur."[4] Upon the true meaning of these passages commentators have been greatly divided.[5] Even in case of mere gratuitous mandates, the code is supposed to have required very exact diligence, and to have made the mandatary liable for slight neglect.[6] "A procuratore dolum et omnem culpam, non etiam improvisum casum, præstandum esse, juris auctoritate manifeste declaritur."[7]

§ 183. The true rule undoubtedly is, that as the contract of agency is one for the benefit of both parties, the agent is understood to contract for reasonable skill and ordinary diligence, and

[1] Madeira *v.* Townsley, 12 Martin, 84. Lord Holt, in applying the doctrine to the analogous cases of hiring, says: "That if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses." Coggs *v.* Bernard, 2 Ld. Raym. 916; Jones on Bailm. 86. And in Buller's Nisi Prius, 72, it is laid down, that "The hirer is to take all imaginable care of the goods delivered for hire." Jones on Bailm. 6; Id. 86. See also 1 Bell, Comm. § 394, pp. 367–370 (4th ed.).

[2] Jones on Bailm. 15, 16.

[3] Dig. Lib. 50, tit. 17, l. 23. The Florentine copy has *quidem:* the Vulgate editions, *quidam.* Jones on Bailm. 18–20.

[4] Dig. Lib. 13, tit. 6, l. 5, § 2.

[5] Jones on Bailm. 14, 17, 18–29; Ersk. Inst. B. 1, tit. 1, § 21; Id. tit. 3, § 36.

[6] 1 Stair, Inst. B. 1, tit. 12, § 10; Ersk. Inst. B. 3, tit. 3, § 36; Story on Bailm. § 173; Heinecc. Elem. Jur. Inst. Lib. 3, tit. 14, § 788; 1 Domat, B. 1, tit. 15, § 3, art. 4.

[7] Cod. Lib. 4, tit. 35, l. 13; Heinecc. Elem. Pand. Lib. 17, tit. 1, § 233; Heinecc. Elem. Jur. Inst. Lib. 3, tit. 14, § 788.

he is consequently liable for injuries to his employer, occasioned by the want of reasonable skill, and also for ordinary negligence.[1] By reasonable skill, we are to understand, such as is, and no more than is, ordinarily possessed and employed by persons of common capacity, engaged in the same trade, business, or employment.[2] By ordinary diligence, we are to understand, that degree of diligence which persons of common prudence are accustomed to use about their own business and affairs.[3]

§ 184. This seems, also, to have been the rule of the Roman law, where *culpa* or *levis culpa*, is deemed to be equivalent to ordinary neglect, or the want of ordinary diligence.[4] And in regard to skill, although the language of the Roman lawyers is, "Imperitia culpæ adnumeratur; spondet peritiam artis; spondet diligentiam gerendo negotio parem;"[5] yet, this is to be under-

[1] Jones on Bailm. 9, 10, 23; Id. 86, 119; Story on Bailm. §§ 23, 455; 1 Bell, Comm. § 389, p. 364; Id. § 411, p. 387 (4th ed.); Molloy, B. 3, ch. 8, § 10; 3 Chitty on Com. & Manuf. 215; Chapman *v.* Walton, 10 Bing. 57; Madeira *v.* Townsley, 12 Martin, 84; Leverick *v.* Meigs, 1 Cowen, 645; Broussard *v.* Declouet, 18 Martin, 260; Lawler *v.* Keaquick, 1 John. Cas. 174; Savage *v.* Birckhead, 20 Pick. 167. [But a broker was held not to be liable for an error of judgment, where he was employed to sell raisins, which were to be of "fair average quality in opinion of selling broker," and the purchaser objecting to quality, he examined them, and decided that they were not of the quality required. Pappa *v.* Rose, L. R. 7 C. P. 32, 525. Nor is an agent liable for injuries that are caused by his mistake in a doubtful matter of law, as where a bank, to which a note had been sent for collection, demanded payment from the maker, and notified the endorsers on the day the note was due without grace, whereby the endorsers were discharged, and it appeared that the question had not then been decided when such notice should be given, and there was no uniform practice. Mechanics' Bank *v.* Merchants' Bank, 6 Metc. 13. So negligence in a gratuitous agency was held to consist in failing to exercise that skill which the agent held himself out as possessing. Jenkins *v.* Bethan, 15 C. B. 168. — Ed.]

[2] Story on Bailm. §§ 431–434; Jones on Bailm. 94, 98, 99; Denew *v.* Daverell, 3 Camp. 451; Seare *v.* Prentice, 8 East, 348; 1 Stair, Inst. by Brodie, B. 1, tit. 12, § 10, and note; Simpson *v.* Swan, 3 Camp. 291; Madeira *v.* Townsley, 12 Martin, 84; Dartnall *v.* Howard, 4 B. & Cressw. 345; Park *v.* Hammond, 6 Taunt. 495; Cheviot *v.* Brooks, 1 John. 364; Chapman *v.* Walton, 10 Bing. 57.

[3] Jones on Bailm. 5–7; Id. 121; Story on Bailm. § 11.

[4] Jones on Bailm. 21–23; Heinecc. Elem. Inst. Lib. 3, tit. 14, §§ 78; Id. Pand. Lib. 17, tit. 1, § 233; Ersk. Inst. B. 3, tit. 3, §§ 36, 37; Pothier, Observ. Générale, at the end of his Treatise on Obligations; 1 Pothier, Œuv. (ed. 1781), 4to, p. 455; Story on Bailm. § 24; 1 Bell, Comm. § 389, p. 364 (4th ed.); Id. pp. 481, 482 (5th ed.).

[5] Jones on Bailm. 23, note (*m*); Id. 63, note (*w*); Id. 99, note (*l*); Dig. Lib. 50, tit. 17, l. 132.

stood with the proper qualification, that the agent contracts for the reasonable skill belonging to persons in general, engaged in the like business or employment. "In negotio gerendo opus sit diligentia atque industria; et is, qui mandat, diligentiam rei gerendæ convenientem exigere; et qui suscipit mandatum, hoc ipso industriam et diligentiam ad rem exequendam necessariam in se futuram, recipere videtur;"[1] which words seem to import no more than reasonable diligence and skill, adequate to the ordinary performance of the task required. In another place it is added, "Nihil enim amplius, quam bonam fidem præstare eum oportet, qui procurat."[2] However, the civilians are not agreed upon this point; and therefore, what is here propounded must be deemed open to much doubt and discussion.[3] The same rule, at least in regard to diligence, prevails in the Scotch law,[4] in that of France, and, indeed, in all the continental nations of Europe, which derive their jurisprudence from the Roman law.[5]

[1] Vinn. ad Inst. Lib. 3, tit. 27, § 11, n. 2. See Pothier, Traité de Mandat, n. 46, 48; Id. Louage, n. 425; Story on Bailm. §§ 431–435; 1 Domat, B. 1, tit. 4, § 8, n. 1, art. 1; Id. B. 1, tit. 15, § 3, art. 4, 5; 1 Liverm. on Agency, ch. 8, § 3, pp. 336, 337; Id. 352; 1 Bell, Comm. § 394, pp. 367–370 (4th ed.); Id. pp. 481, 482 (5th ed.).

[2] Dig. Lib. 17, tit. 1, l. 10, Introd.

[3] Ibid.

[4] Ersk. Inst. B. 3, tit. 1, § 21; Id. tit. 3, § 36; 1 Bell, Comm. § 411, p. 387 (4th ed.); Id. § 389, p. 364; Id. pp. 481, 482 (5th ed.).

[5] Pothier on Oblig. n. 141, 142; Pothier on Oblig. App'x, Observ. Générale; 1 Pothier, Œuv. 455 (2d ed. 4to, 1781); Story on Bailm. §§ 24, 430–435; Jones on Bailm. 30, 31. [The word *culpa* nearly coincides in meaning with the English law term negligence. It was formerly thought that three degrees of *culpa* or negligence were recognized by the Roman law. These were the *culpa lata*, the *culpa levis*, and the *culpa levissima*: gross negligence, negligence, and slight negligence. Lord Holt brought this theory into the English law, by his opinion in Coggs *v.* Bernard, 2 Ld. Raym. 909. In his essay on Bailments, Sir William Jones adopted it from Pothier, and from the case of Coggs *v.* Bernard, and brought it into great prominence. Mr. Justice Story also gave his countenance to the theory.

Hugo Donellus, in the latter part of the sixteenth century, proved that there was no *culpa levissima* as a distinct degree. The works of Donellus were for a long time neglected; but since the beginning of the present century they have acquired a great reputation, especially in Germany, where their author is by many regarded as the greatest of the jurists. In 1764, Lebrun, an advocate of the Parliament of Paris, published an essay in which he maintained that this threefold division had no real foundation in the Roman law, but was a pure invention of the commentators. See Jones on Bailments, p. 26 et seq. Thibaut and Löhr, distinguished German professors of law, also repudiated this division. But the work of Hasse, *Die Culpa des Römischen Rechts*, published in 1815, seems to have caused the doctrine of the three degrees to be generally

§ 185. Whether the proper degree of diligence and skill, which the law requires of agents in performing their duties, has been applied in a particular trade, employment, or business, is for the most part a matter of fact, open for inquiry, and sometimes involving points of great delicacy and difficulty. The general usages of trade, the common habits of the particular business, and the special mode of dealing between the principal and agent, will often explain and expound the duties required of the agent, as to diligence and skill.[1]

§ 186. The case of a factor, employed to make sale of goods on consignment, may furnish a fit illustration of the general doctrine. He is bound, not only to good faith, but to reasonable diligence. It is not sufficient, that he has been guilty of no fraud, or of no such gross negligence as would carry with it the insignia of fraud. He is required to act with reasonable care and prudence in his employment, and to exercise his judgment after proper inquiries and precautions. If he shut his eyes against the light, or sell to a person without inquiry, when ordinary diligence would have enabled him to learn the discredit or insolvency of the party, he will not be discharged from responsibility to his principal. So, also, he will not be permitted to sell his own goods to a purchaser, and take security for the price, and at the same time to sell the goods of his principal to the same party without any security.

regarded as an exploded theory of the past. The Prussian law codified in the last century, in conformity to the theory then in vogue defines three degrees of negligence; but this division is not found in the Austrian, the French, or the Dutch code, these codes having been formed since the opposite view gained the ascendency.

The doctrine of three degrees fails in reconciling those texts of the Roman law, to which, if correct, it should be applicable. The terms *lata, latior; levis, levior, levissima; diligens, diligentissimus; exacta, exactissima;* where they occur in the *Corpus Juris*, are now considered simply as variations of style, used without a thought of the distinctions which the commentators endeavored to found upon them.

According to the now established opinion, the Roman law in most cases required of a person the conduct of a prudent man, — *diligentia diligentis patris familias* (the care of a prudent person who is *sui juris*). In a few cases, as, for instance, in suits between partners, the defendant might show in defence that he conducted the partnership affairs with as much care as he used about his own; it being his partner's loss if he chose to enter into that relation with a careless man. Goudsmit, Pandects, § 76; Ortolan, Explication Historique des Instituts, L. 3, p. 353; Demangeat, Droit Romain, T. 2, p. 444; Lagrange, Manuel de Droit Romain, p. 468, n. 2; Maynz, Droit Romain, T. 2, § 259. — G.]

[1] Ante, §§ 95, 96; Nichols *v.* House, 2 La. 382; 3 Chitty on Com. & Manuf. 215–218.

For, he is bound to exercise at least as much diligence and care, as to his factorage transactions, as he does to his own private concerns.[1] And, in the supposed case, it would afford ground for presumption that the factor had knowledge of some latent defect of credit, although in the commercial world in general the purchaser stood with a fair character. But this presumption would not ordinarily arise from the mere fact of the factor's taking security for advances made to the same purchaser in money, or even receiving a premium for such advances. He may well refuse to lend his own money without security, or a premium, upon grounds altogether distinct from any doubt of the solvency of the party. In order to affect the factor with the imputation of negligence, it is sufficient, if he have notice of facts which ought to put a person of ordinary prudence on his guard. For the same rule prevails here as in equity, that the factor will be held affected with the notice, if the facts be such as ought to have put him upon further inquiry before he sold the goods.[2]

§ 187. Another illustration may be derived from the case of insurance brokers, or agents employed to procure insurance. Their duty is to take care that the policy is procured in such a manner, and in such terms, as to cover the contemplated voyage and risks; and they are bound to possess reasonable skill on this subject. So, they are to take care that the underwriters are persons in good credit at the time of the insurance, otherwise, they must bear the loss arising from their insolvency.[3] But if the underwriters are in

[1] [Thus, he is bound in the absence of special directions as to price to sell his principal's goods for their fair market value. Bigelow *v.* Walker, 24 Vt. 149. But where stock-brokers had not taken security for the return of a deposit, it was held that such degree of care was not necessary, and they were only bound to exercise competent skill and proper care in the services they undertook to perform, Gheen *v.* Johnson, 90 Pa. St. 38: and a broker is bound to exercise at least the same care that a prudent man would take in his own private concerns, Deshler *v.* Beers, 32 Ill. 368. So, where B., a broker, advised A. to sell certain unregistered bonds and buy others, and A. answered by letter that he was anxious to get his money into registered bonds, and authorized B. to invest "in the best paying and surest bonds he knew of, and to make such sale and purchase of bonds as your own good sense dictates," it was held that if he acted in good faith he was not liable for loss upon the bonds he purchased for A., although they were all unregistered. Matthews *v.* Fuller, 123 Mass. 446. — Ed.]

[2] Burrill *v.* Phillips, 1 Gall. 361; Molloy, B. 3, ch. 8, § 5; Leverick *v.* Meigs, 1 Cowen, 645; [Clarke *v.* Tipping, 9 Beavan, 284].

[3] Post, §§ 191, 218; [Bower *v.* Hartley, L. R. 1 Q. B. D. 652; Gettins *v.* Scudder, 71 Ill. 86].

good credit at the time, their subsequent insolvency will not make the broker responsible to his employer.[1]

§ 188. But new cases and new exigencies are perpetually arising, in which it is not easy to say that there is any established general rule; or that, if a general rule is established, it can with propriety govern such new cases, under all their circumstances. Resort must then be had to the general principle of law on the subject, aided by a search into those kindred doctrines, which may furnish analogies to guide or instruct us in arriving at the proper conclusion. It may, however, be generally stated, that where an agent has used reasonable diligence and skill he is not liable for accidents, or losses, or damage, happening without his default, such, for example, as for losses by robbery, by fire, or by other accident, either at sea or on the land.[2] There are special exceptions; such, for example, as the case of common carriers; and other exceptions may arise, from the particular contract or dealing between the parties, which may enlarge, or narrow the duty and responsibility of the agent.[3] In this last particular our law adopts the rule of the civil law: "Nisi si quid nominatim convenit, vel plus, vel minus, in singulis contractibus; nam hoc servabitur, quod initio convenit; legem enim contractus dedit."[4] However, an agreement, that the agent should not be liable for his own frauds, would be held utterly void, as inconsistent with morals and public policy. "Legem enim contractus dedit; excepto eo, quod Celsus putat, non valere, si convenerit, ne dolus præstetur. Hoc enim bonæ fidei judicio contrarium est; et itur utimur."[5] "Illud nullâ pactione effici potest, ne dolus præstetur."[6]

§ 189. It is in this connection, that we are most commonly called upon to consider, when an agent is bound to act upon the instructions of his principal, or, in other words, when he is bound to execute the orders sent or delivered to him. And the doctrine under this head, subject to the qualifications hereinafter stated,[7] may

[1] 1 Valin, Comm. Lib. 3, tit. 6, art. 3, p. 33; Post, § 191.

[2] 1 Domat, B. 1, tit. 15, § 3, art. 4; Ersk. Inst. B. 3, tit. 1, § 21; Coggs *v.* Bernard, 2 Ld. Raym. 917; Story on Bailm. §§ 23, 25–31; Jones on Bailm. 44, 119–122; Molloy, B. 3, ch. 8, § 7.

[3] Jones on Bailm. 120–122; Story on Bailm. §§ 25–38; Nicholson *v.* Willan, 5 East, 513; Bridge *v.* Austin, 4 Mass. 114.

[4] Dig. Lib. 50, tit. 17, l. 23; Story on Bailm. §§ 34, 35.

[5] Dig. Lib. 50, tit. 17, l. 23.

[6] Dig. Lib. 2, tit. 14, l. 27, § 3.

[7] Post, §§ 194–196; [Coker *v.* Ropes, 125 Mass. 577].

be reduced to one general principle; which is, that every agent is bound to execute the orders of his principal, whenever, for a valuable consideration (for we are not treating of mere gratuitous agency), he has undertaken to perform them.[1] This duty may arise in various ways; either by express agreement, or by clear implication. The former requires no explanation. The latter may arise either from the common usages of the particular agency; or from the general modes of dealing between the particular parties; or from the natural implications, arising from the nature and objects of a single transaction.

§ 190. The most familiar illustrations of this doctrine will be found in the cases, where an agent is called upon by orders to procure insurance for his principal. We have already seen in what cases an agent may, in his discretion, insure for his principal;[2] we are now to consider when he is absolutely bound to insure. And it is now clearly settled, that there are several cases, in which an agent is bound to obey an order to insure. One is, where the agent has expressly contracted to procure insurance.[3] Another is, where a merchant abroad has effects in the hands of his correspondent here, and he has a right to expect that he will obey an order to insure; because he is entitled to call his money out of the other's hands, when, and in what manner, he pleases. Another is, where the merchant has no effects in the hands of his correspondent; yet, the course of dealing between them has been such, that the one has been used to send orders for insurance, and the other to comply with them; in such a case the former has a right to expect, that his orders for insurance will still be obeyed, unless the latter gives him notice to discontinue that course of dealing.[4] Another is, where the merchant abroad sends bills of lading to his correspondent here, and ingrafts on them an order to insure, as the implied condition, on which the bills of lading are to be accepted; in such a case the agent is bound to obey, if he accepts them; for it is one entire transaction.[5] Another may

[1] Le Guen *v.* Governeur, 1 John. Cas. 437, n.; Bell *v.* Palmer, 6 Cowen, 128; La Farge *v.* Kneeland, 7 Cowen, 456; Allen *v.* Suydam, 20 Wend. 321.

[2] Ante, § 111; Lucena *v.* Crawford, 3 Bos. & Pull. 75; s. c. 5 Bos. & Pull. 269; De Forest *v.* Fulton Ins. Co. 1 Hall, 84, 100–136.

[3] Tickel *v.* Short, 2 Ves. 239; Marsh. on Ins. B. 1, ch. 8, § 2, pp. 296, 297.

[4] Ralston *v.* Barclay, 6 Miller (La.), 653; Berthoud *v.* Gordon, 6 Miller (La.), 583; [Williamsburgh, &c. Ins. Co. *v.* Frothingham, 122 Mass. 391].

[5] Smith *v.* Lascelles, 2 T. R. 189; 2 Molloy, B. 3, ch. 8, § 9; Morris *v.*

be added, which is, where the general usage of trade requires the agent to insure. And here we may remark, that it seems to be the duty of an agent who is ordered or bound to procure insurance, to give notice to his principal, if he is unable to effect it; for, otherwise, the principal may be subjected to a loss, which he could have provided against, by procuring insurance to be made elsewhere. If, in any of the foregoing cases, the agent negligently or wilfully omits his duty, he becomes responsible to his principal for all losses sustained by the want of the insurance. And this rule is promulgated by the general sense of foreign maritime writers, as well as by our own law. The rule being, "Mandato dato de assecurandis mercibus, si non est ad impletum mandatum, tenetur mandatarius de casu sinistro." [1]

§ 191. What is the proper exercise of due diligence and skill, in obtaining insurance, is, in some cases, a matter of great nicety and difficulty. On the one hand, an agent who acts *bona fide* in effecting an insurance for his principal, using reasonable skill and diligence, is not liable to be called upon because the insurance might possibly have been procured from other persons upon better terms, or to include additional risks, by which the principal might, in the event of loss by those risks, have been indemnified.[2] On the other hand, an agent, in a like case, is bound to have inserted in the policy all the ordinary risks and chances which are usual and proper, to secure the principal for the contemplated voyage.[3] And if he omits to have them inserted, when a reasonable attention to the facts stated in his orders, or the nature of the voyage, or the state of the property, or the objects intended, would have induced other insurance agents, of reasonable skill and diligence, to have had them inserted, he will be liable, in case of any loss, for his negligence.[4] The same rule will apply, if such an agent negligently or wilfully conceals a material fact, or affirms a false fact,

Summerl, 2 Wash. Cir. 203; s. c. Marsh. on Ins. by Condy, note to p. 301; Wallace *v.* Telfair, 2 T. R. 188, note; Smith on Merc. Law, 51 (2d ed.); Id. ch. 5, pp. 91–93 (3d ed. 1843); De Tastett *v.* Crousillat, 2 Wash. Cir. 132; French *v.* Reed, 6 Binn. 308; Berthoud *v.* Gordon, 6 La. 579; Marsh. on Ins. B. 1, ch. 8, § 2, pp. 296, 297; 1 Phillips on Ins. ch. 22, pp. 519–524.

[1] Emerig. Des Assur. Tom. 1, ch. 5, 8, p. 148; Casaregis, Disc. 1, n. 26.

[2] Moore *v.* Morgue, Cowp. 479; Comber *v.* Anderson, 1 Camp. 523; 1 Liverm. on Agency, 344–347 (ed. 1818).

[3] Post, §§ 200, 218.

[4] Post, § 200; Park *v.* Hammond, 6 Taunt. 495; s. c. 4 Camp. 344; Mallough *v.* Barber, 4 Camp. 150; Farren *v.* Oswell, 3 Camp. 357.

whereby the policy is avoided; for his duty in each case is violated.[1] So (as we have seen) it is the duty of an agent, procuring insurance, to ascertain whether the underwriters are in good credit or not at the time of procuring the policy;[2] and if he negligently omits this duty, and a loss occurs from the insolvency of the underwriters at the time of subscribing the policy, he will be liable to pay it.[3] So, if an agent has procured a policy, and it remains in his hands, he is bound to apply to the underwriters for payment of it within a reasonable time; and if a loss occurs by his neglect, he will become responsible therefor.[4]

§ 192. Thirdly. The remarks which have been already made, naturally conduct us to the next head of inquiry, and that is, what are the incidental acts which the law requires of agents, in the discharge of their duties and obligations? And here, in the first place, it may be stated to be the primary obligation of an agent, whose authority is limited by instructions, to adhere faithfully to those instructions, in all cases to which they ought properly to be applied.[5] If he unnecessarily exceeds his commission, or risks the property of his principal, he thereby renders himself responsible to his principal for all losses and damage, which are the natural consequences of his act. And it will constitute no defence for him, that he intended the act to be a benefit to the principal.[6] Indeed,

[1] Mayhew *v.* Forrester, 5 Taunt. 615. See Wake *v.* Atty, 4 Taunt. 493; Seller *v.* Work, 1 Marsh. on Ins. B. 1, ch. 8, § 2, p. 300; Id. ch. 11, § 1, p. 466.

[2] Ante, § 187; Post, § 218.

[3] Valin, Comm. Tom. 1, Liv. 3, tit. 6, art. 3, pp. 32, 33; Ante, § 187. [In Gettins *v.* Scudder, 71 Ill. 86, it was held, however, that an insurance broker is not liable when he insures in companies which are solvent, or generally so considered, although his principal requests him to insure in other companies, and the companies he has chosen, fail. — Ed.]

[4] Smith on Merc. Law, 198 (2d ed.); Id. B. 3, ch. 4, § 1, p. 322 (3d ed. 1843); Power *v.* Butcher, 10 B. & Cress. 329; Ante, §§ 58, 103, 109, note.

[5] Rundle *v.* Moore, 3 John. Cas. 36; 3 Chitty on Com. & Manuf. ch. 3, pp. 215, 216, 220; Malyne, Lex Merc. ch. 16, p. 81; [Blot *v.* Boiceau, 1 Sandf. Sup. Ct. (N. Y.) 111; Marfield *v.* Douglas, Ibid. 361; Wilson *v.* Wilson, 26 Penn. St. 394; Johnson *v.* New York Central Railroad, 31 Barb. 98.

[6] 3 Chitty on Com. & Manuf. ch. 3, pp. 215, 218; 1 Beawes, Lex Merc. 44, 46; Ure *v.* Currell, 16 Martin, 502; Manella *v.* Barry, 3 Cranch, 415; Post, § 199. [Thus, where the principal directed his agent to remit him $300 in bills of $50 or $100 each, and the agent sent the amount in bills of $5, $10, and $20, which never reached the principal, the agent was held to have deviated from his instructions and to be liable for the loss. Wilson *v.* Wilson, 26 Penn. St. 394. Lewis, C. J., said: "The primary obligation of an agent, whose authority is limited by instructions, is to adhere faithfully to those instructions, in all cases to which they ought properly to apply. Story on Agency, § 192.

in all such cases, the question is not whether the party has acted from good motives and without fraud, but whether he has done

He is in general bound to obey the orders of his principal *exactly*, if they be imperative and not discretionary; and, in order to make it the duty of a factor to obey an order, it is not necessary that it should be given in the form of a command. The expression of a wish by the consignor may fairly be presumed to be an order. Story on Contracts, § 359; Brown *v.* McGran, 14 Peters, 494. It is true that instructions may be disregarded in cases of extreme necessity arising from unforeseen emergencies, or if performance becomes impossible, or if they require a breach of law or morals. Story on Agency, § 194. These are, however, exceptional cases. There may, perhaps, be others which have been sanctioned by adjudications, founded on the principle that the departure complained of was not material. But the general rule is as indicated in what has been said, and the case before the court was not brought within any of the exceptions. To justify a departure from instructions, where a loss has resulted from such deviation, the case must be brought within some of the recognized exceptions. It is not sufficient that the deviation was not material if it appear that the party giving the instructions regarded them as material, unless it be shown affirmatively that the deviation in no manner contributed to the loss. This may be a difficult task in a case like the present; but the defendant voluntarily assumed it when he substituted his own plan for that prescribed by the plaintiff. To force a man to perform an executory contract after substituting for the consideration other terms than those provided for in the bargain, is to deprive him of the right to manage his own business in his own way. To do this on the ground that the departure is not material, when it is manifest that the party considered it otherwise, is a violation of private right, which leads to uncertainty and litigation without necessity or excuse. In Nesbit *v.* Burry, 1 Casey, 210, this court refused to compel a man to give up his oxen, although he had sold them and received part of the purchase-money, because it was a part of the contract that they were sold by weight, and the weight was to be ascertained by 'the scales at Mount Jackson.' The scales designated were so out of repair that the weight could not be ascertained by them, and it was held that no others could be substituted against his consent so as to divest his right of property. Whether an action for damages could have been sustained was not the question there; nor is it the question here. As between vendor and vendee, the right of property and the consequent risk vests on delivery of the goods purchased to the designated carrier, packed, and directed according to usage or instructions. But if a different method of packing and directing, or a different carrier than the one designated, be adopted by the vendor, he assumes the risk in case of loss, unless it be shown that his deviation in no way contributed to the loss. Where the goods are stolen, how can this be shown? In sending bank-notes by mail, it is manifest that while a large package would attract the attention and care of honest agents on the route, it might tempt the cupidity of dishonest ones. The party who proposes to take the risk of this method of remittance has a right to weigh the advantages and disadvantages of the various methods of enclosing the notes; and if he directs the money to be remitted in notes of $100 or $50, the debtor has no right to increase the size of the package by remitting in notes of $10 and $5. There was error in permitting the jury to find that the departure from instructions was immaterial." And after a broker had prepared a slip and the proposed

his duty, and acted according to the confidence reposed in him; for the rule is, "Grave est fidem fallere:[1] Fides servanda est; Simplicitas juris gentium prævaleat."[2] On the other hand, if by the violation of his instructions he obtains a profit or advantage, he is not allowed to retain it; but the principal is entitled to the full benefit of it.[3] So, an agent, by his misconduct, must bear the whole risk of failure and loss, and is not entitled to any indemnity for his unauthorized act or speculation.[4] The law never holds out a premium for any violation of duty. What will be the effect of a subsequent ratification by the principal, will come under review in our subsequent pages.[5]

§ 193. In regard to instructions, there are two qualifications, which are naturally, and perhaps necessarily, implied in every case of mercantile agency. The first is, that they are applicable only to the ordinary course of things; and the agent will be justified in cases of extreme necessity and unforeseen emergency, in deviating from them.[6] Thus, for example, if goods are perishable and perishing, the agent may deviate from his instructions, as to the time or price at which they are to be sold.[7] So, if they are accidentally injured, and must be sold to prevent further loss. So, if they are in imminent peril of being lost by the capture of the port, they may for safety, in a case of necessity, and not otherwise, be transported to another port.[8]

insurer had accepted it and had prepared a policy in accordance with it, and the broker cancelled the policy with the consent of the underwriter, but without consulting the insured, it was held that he had no authority to cancel the policy, and that the policy was still binding on the underwriter. Xenos *v.* Wickham, L. R. 2 H. L. 296. —R.]

[1] Dig. Lib. 13, tit. 5, Introd.

[2] Manella *v.* Barry, 3 Cranch, 415. [* Langton *v.* Waite, Law Rep. 6 Eq. 165.]

[3] Malyne, Lex Merc. 82; Massey *v.* Davies, 2 Ves. jr. 317; Beaumont *v.* Boultbee, 7 Ves. 608, 617; Post, §§ 207, 214, 340.

[4] 3 Chitty on Com. & Manuf. ch. 3, pp. 216, 218, 221; Williams *v.* Littlefield, 12 Wend. 362.

[5] Post, §§ 239-260, 439, 445.

[6] Ante, §§ 85, 118, 141; Post, § 237; 1 Liverm. on Agency, ch. 8, § 2, pp. 368–370 (ed. 1818); 3 Chitty on Com. & Manuf. ch. 3, p. 218; Dusar *v.* Perit, 4 Binn. 361; [Bernard *v.* Maury, 20 Gratt. (Va.) 434].

[7] 3 Chitty on Com. & Manuf. ch. 3, p. 218; Anon. 2 Mod. 100; Story on Bailm. § 455; Ante, §§ 85, 118, 141; Post, § 237.

[8] See Catlin *v.* Bell, 4 Camp. 183. [Thus, where a merchant orders his factor to sell his goods on a fixed day at a certain price, and, if they are not sold, to ship them, the factor has no power to make an offer of the goods on the day named to be accepted the next day, although at the price specified. Scott *v.*

§ 194. It is a proper corollary from this principle, that any unavoidable calamity, or overwhelming force or accident, without any default of the agent, will excuse him from a strict performance of the duties of his agency; for all such cases are deemed exceptions to the general rule.[1] *A fortiori*, if the strict performance becomes impossible, without any default of the agent, he is excused.[2] The Roman law was even more indulgent in cases of mandataries, excusing them for non-performance in cases of sickness; or of capital enmities; or of an action becoming fruitless against the principal (as where he had directed goods to be purchased, and became insolvent); and for other causes deemed just. "Sane, si valetudinis adversæ, vel capitalium inimicitiarum, seu ob inanes rei actiones, seu ob aliam, justam causam, excusationes allegat; audiendus est."[3]

§ 195. The second qualification is, that, if the instructions require the agent to do an illegal or immoral act, he may violate his instructions with impunity; for the law will not tolerate either

Rogers, 31 N. Y. 676. So, where the defendant agreed to ship goods for the plaintiff to New York by a certain line of canal boats, and under deck, and he thereupon shipped them by another line and only partially covered, it was held that he was liable for the damage done to the goods in transportation, as he had shipped them in a manner prohibited by his principal. Wilts *v.* Morrell, 66 Barb. 511. But where the instructions of an owner of flour at Liverpool were to withhold it from sale until an expected Act of Parliament had produced its results upon the market, the factor is not liable for a breach of his instructions in selling prematurely, if he wait a considerable time after the passage of the Act and then sell in good faith, and with reasonable prudence, although in fact he makes an error of judgment. Milbank *v.* Dennistoun, 21 N. Y. 386. And where a factor has been induced by fraud to part with the goods of his principal to an insolvent purchaser, who removes the goods so that they cannot be followed, and thereupon, acting in good faith, the broker takes security for the price of the goods, and thus affirms the sale, his principal is bound. Joslin *v.* Cowee, 52 N. Y. 90. Where an agent has deviated from his instructions, if he informs his principal of the fact at once, and the latter thereupon ratifies the act in terms, or fails within a reasonable time to disapprove it, the agent is not liable for the consequences of such deviation. Bray *v.* Gunn, 53 Ga. 144. But the rule authorizing a factor to disregard the instructions of his principal is limited to acts in protection of his own interest, and he can only disobey his principal's orders to sell when an immediate sale would impair his own security. Weed *v.* Adams, 37 Conn. 378; Field *v.* Farrington, 10 Wall. 141. — Ed.]

[1] Ante, §§ 85, 118, 141; Post, §§ 200, 208, 237; [Wilson *v.* Wilson, 26 Penn. St. 394].

[2] Smith *v.* Cologan, 2 T. R. 188, n.; Ante, §§ 85, 118, 141, 188; Post, § 237.

[3] Dig. Lib. 17, tit. 1, l. 23–25; Pothier, Pand. Lib. 17, tit. 1, n. 80.

party in violating any moral or legal duties.[1] "Rei turpis nullum mandatum est; et ideo hac actione non agetur.[2] Illud quoque mandatum non est obligatorium, quod contra bonos mores est. Veluti, si Titius de furto, aut de damno faciendo, aut de injuria facienda, tibi mandet; licet enim pœnam istius facti nomine præstiteris, non tamen ullam habes adversus Titium actionem.[3] Pacta, quæ contra leges constitutionesque, vel contra bonos mores fiunt, nullum vim habere, indubitati juris est," is the strong language of the Roman law;[4] and it is more strongly dictated by the sound morals inculcated by Christianity.[5] Thus, for example, if goods are bought or sold by an agent, to be smuggled in violation of the laws of the country, no recovery or account can be had by either party of the same; for the law, in such a case, refuses to interfere on either side, upon the principle, "Ex turpi causa non oritur actio."[6] And where the fault is mutual, the law will leave the case as it finds it; "In pari delicto potior est conditio defendentis."[7] So, if a person is employed, and money is advanced to him for the purchase of libellous books or indecent pictures, he will not be compelled to account. And, on the other hand, if he has advanced the money for such immoral purposes, at the request of his employer, he cannot recover these advances, or compel the employer to take the books or the pictures, and to pay for them. Nay, the principle is carried further; and if the main object for which the agent is employed, is legal; yet if, by the terms of the contract, and as a part of it, the agent is to act in an illegal character or manner in another part of the transaction, the whole contract will be contaminated thereby, and the agent can recover no

[1] Catlin *v.* Bell, 4 Camp. 183; Bexwell *v.* Christie, Cowp. 395; Webster *v.* De Tastet, 7 T. R. 157; 3 Chitty on Com. & Manuf. 216.

[2] Dig. Lib. 17, tit. 1, l. 6, § 3.

[3] Inst. Lib. 3, tit. 26, § 7.

[4] Cod. Lib. 2, tit. 3, l. 6; Story on Conflict of Laws, § 245.

[5] Holman *v.* Johnson, Cowp. 343; 1 Story on Eq. Jurisp. § 296; Story on Conflict of Laws, §§ 244–260.

[6] Holman *v.* Johnson, Cowp. 343; Story on Conflict of Laws, §§ 244–258; Armstrong *v.* Toler, 11 Wheat. 258, 260.

[7] [But an agent receiving profits cannot set up as a defence against his principal the illegal character of the occupation in which they are realized. Pointer *v.* Smith, 7 Heisk. 137. In this case an agent took slaves from a Tennessee farmer into Alabama, and hired them to Alabama farmers, from whom he collected payment, but did not account to his principal therefor. See Brooks *v.* Martin, 2 Wal. 70. — Ed.]

compensation even for his legal acts under the contract. Neither can the principal enforce any of its obligations.[1]

§ 196. This doctrine is founded in the principles of eternal justice; and it is greatly to be lamented, that it has not been followed out in our intercourse with foreign nations, to the extent of refusing to interfere in contracts, even between our own citizens, which are made in violation of the laws of trade and the public policy of foreign nations. Pothier, with the deep feelings of a moralist and universal jurist, has inculcated and enforced, in a persuasive manner, this enlarged doctrine.[2] But the general practice of nations is the other way; and that practice is sustained by the common law, as well as by the authority of Valin and Emerigon.[3]

§ 197. However, it will not be presumed, that an agent is authorized to violate the laws of a foreign country (as, for example, by smuggling); and, therefore, either an express authority must be shown, or an implied authority from the known habits of the particular trade, or the general dealings between the parties in similar enterprises.[4] We hope that the time may arrive, when the general cultivation of international law, enlightened and reformed by Christian morals, will introduce a better system, which shall declare, that the common interests of all nations are best promoted by a steady support of all the municipal laws of each, which are not inconsistent with justice, rational liberty, and liberal intercourse.

§ 198. In regard to instructions, they must often leave much to

[1] Ibid.; Story on Conflict of Laws, §§ 246–248; The Vanguard, 6 Rob. 207; [Kirwan *v.* Goodman, 9 Dowl. 330].

[2] Pothier d'Assur. n. 58, and note of Estrangin. ad locum (ed. 1810), pp. 86–89.

[3] Story on Conflict of Laws, §§ 245, 246, 257; 1 Emerig. d'Assur. ch. 8, § 5, pp. 212, 215; ed. by Boulay Paty, pp. 215–218; 2 Valin, Comm. art. 49, p. 127; 1 Marsh. on Ins. ch. 3, § 1, pp. 59–61; Planche *v.* Fletcher, Doug. 251, 254; 1 Chitty on Com. & Manuf. 83, 84.

[4] Wellman *v.* Nutting, 4 Mass. 434; Molloy, B. 3, ch. 8, § 6. [Thus, where an agent for the loaning of money loaned it at usurious rates, it was held that he would not be presumed to have had authority to make the loan, and that his act would not affect his principal. Gokey *v.* Knapp, 44 Ia. 32; Boylston *v.* Bain, 90 Ill. 283; and where the agent exacts a bonus for himself as a condition for making a loan, the principal is not liable for such an unauthorized act, without proof that he knew and assented to it, or received a portion of the bonus. Van Wyck *v.* Walters, 81 N. Y. 352. See article on this subject, in 20 Albany Law Jour. 464; and in Condit *v.* Baldwin, 7 Smith (N. Y.), 219, where an agent exacted such a bonus, it was held that commencing a suit on the note for the money loaned was no ratification of such act of the agent by the principal. — Ed.]

the discretion of the agent; and, under such circumstances, his proper duty must be ascertained by the considerations already mentioned, as well as by those which will be hereinafter stated.[1] Thus (to suggest a rule in a general form), where an agent has general orders to dispose of goods for his principal to the best advantage (a very common mode of expression to be found in written orders), he is bound to execute them with that degree of diligence and skill, which prudent men usually exercise in similar affairs;[2] and, consequently, he may dispose of the goods according to the best terms, which can be obtained at the time; and if he does so, his principal will be bound thereby, although the sale may turn out in the event to be disadvantageous.[3] And sometimes even a literal deviation from the terms of the orders may be excused, and the act bind the owner, if the conditions and objects of the order are substantially obtained, without any increase of expense or risk to the principal. Thus, if an agent should exceed the limited price in a purchase of goods in a small degree, and yet he should be able to effect an equal saving in some other part of the same business, such as in the expense of shipping them, he would, at least in equity, be deemed excused, and the principal be bound.[4]

§ 199. In the next place, it may be laid down as a general rule, in the absence of instructions, that if there be a known usage of trade, or a mode of transacting business, applicable to the particular agency, or analogous to it, in such a case it will be the duty of the agent to conform to it; and any departure from it, not required by necessity, will be at the peril of the agent, and involve him in full responsibility for any loss occasioned thereby.[5] This is not an arbitrary doctrine; but it is founded upon an implied authority on one side, involving an implied confidence and obligation on the other side.[6] We have already seen, that if an agent

[1] Ante, §§ 189, 192; Post, 199, 237.

[2] Kingston *v.* Kincaid, 1 Wash. Cir. 423; Ante, §§ 182, 183.

[3] 3 Chitty on Com. & Manuf. ch. 3, pp. 217, 218; 2 Molloy, B. 3, ch. 8, §§ 2, 5; Malyne, Lex Merc. ch. 16, pp. 81-83; Evans *v.* Potter, 2 Gall. 13; Burrill *v.* Phillips, 1 Gall. 360.

[4] Cornwall *v.* Wilson, 1 Ves. 510; 3 Chitty on Com. & Manuf. ch. 3, p. 219, note (1); Smith on Merc. Law, 53, 54 (2d ed.); Id. ch. 5, § 2, p. 99 (3d ed. 1843); Ante, § 85.

[5] 3 Chitty on Com. & Manuf. 215, 216; Ante, §§ 85, 96, 118, 141, 185, 194; Post, §§ 208, 237.

[6] Ante, §§ 60, 73, 77; [Lamert *v.* Heath, 15 M. & W. 486; Bowring *v.*

acts according to the customary mode of business, and settled usages of trade, he will be protected, although a loss should, without his default, happen thereby, because his authority embraces, by implication, that extent.[1] And it is equally true, that the agent impliedly agrees to act according to such modes of business and usages of trade, and that he is trusted, in the confidence that he will not violate them.[2] It will not, therefore, as we have seen, constitute any defence to the agent, that he intended a benefit to his employer, if he acted in violation of his duty.[3] And, on the other hand, even the usage of trade may not, under all circumstances, excuse an agent for acting in conformity to it, if, by following it, he knowingly and advisedly and wilfully does an injury to his employer thereby; for the very notion of a usage is, that it is to be a guide to his judgment and discretion in common cases, when it is presumed not necessarily to work a sacrifice of the interests of the employer.[4]

§ 200. Illustrations might be easily multiplied, to establish this doctrine in its various aspects. Thus, for example, if an agent, intrusted with the sale of goods, should negligently allow them to remain in an improper place of deposit, contrary to the usual habits of the business, and the goods should be destroyed by fire, he would be responsible for the loss, although the fire arose from an accidental cause; for the loss, although not in a strict sense immediately caused by his negligence, may fairly be attributed to it.[5] So,

Shepherd, L. R. 6 Q. B. 309; Bailey *v.* Bensley, 87 Ill. 566; Gilchrist *v.* Brooklyn Man. Ass., 66 Barb. 390].

[1] Ante, §§ 96, 185; Burrill *v.* Phillips, 1 Gall. 360; Reano *v.* Mager, 11 Martin, 636.

[2] Ibid. We have already seen, that if the construction of the terms of written instructions be doubtful, and the agent has acted in good faith under a mistaken interpretation of their purport, he will not be responsible to his principal for damages or losses occasioned thereby. And, in cases of doubt, the rule is, that the words are to be construed most strongly against the principal. Ante, §§ 74–76, 82. See also Vianna *v.* Barclay, 3 Cowen, 281; Mackbeath *v.* Haldimand, 1 T. R. 182, per Buller, J.; Lucas *v.* Groning, 7 Taunt. 164; Morrell *v.* Frith, 3 Mees. & Wels. 402.

[3] 3 Chitty on Com. & Manuf. ch. 3, pp. 215, 216, 218; Ante, § 192.

[4] 3 Chitty on Com. & Manuf. ch. 3, pp. 215, 216, 218, note (1). See Sadock *v.* Burton, Yelv. 202; Malyne, Lex Merc. 83; Rex *v.* Lee, 12 Mod. 514; 2 Molloy, B. 3, ch. 8, § 5.

[5] Post, § 218; Caffrey *v.* Darby, 6 Ves. 496. This is one of the cases, in which the maxim, Causa proxima, non remota, spectatur, does not apply, although it is not perhaps easy to state the exact grounds of the distinction. The loss is not, indeed, directly caused by the negligence; but the latter may

if an agent should, improperly and contrary to his known duty, or the habits of business, deposit the money of his principal in his own name, and on his own account, with a banker, who should fail, the agent would be responsible to his principal for the money lost by the failure.[1] So, if an agent, authorized to procure insurance for his principal, should, by his negligence, omit to have inserted in the policy the common and usual clauses in the like policies, and a loss should occur which would have been covered by such clauses, the agent would be responsible for the loss.[2] So, if an agent should sell goods on credit, when there was no usage of trade to justify it; or if he should sell on a longer credit than the usage should justify; or if he should omit to demand payment, when the credit had expired; or if he should sell to persons of doubtful credit, or actually insolvent; in all such cases, he would be personally responsible for the loss to his principal.[3] So, if he should give time for payment after the money became due, or should omit to use the common diligence to collect it, the loss would be his own.[4] So, if an agent, authorized to purchase goods, should deviate from his orders as to price, quality, or kind, or otherwise, the principal would not be bound.[5]

§ 201. The employment of sub-agents or substitutes is often expressly provided for in letters of attorney, and other formal instruments. In such cases it is clear, that the original attorney or

properly be said to be the occasion of it. See Davis *v.* Garrett, 6 Bing. 716. The case of a policy-agent stands on a similar ground; for the loss cannot be correctly said to be immediately caused by his neglect, as it may be directly attributable to the peril of the sea. In Caffrey *v.* Darby, 6 Ves. 496, the master of the rolls, in his judgment, speaking of loss, where there had been negligence by trustees, said: "If they have already been guilty of negligence, they must be responsible for any loss in any way to that property; for, whatever may be the immediate cause, the property would not have been in a situation to sustain that loss, if it had not been for their negligence." See Ante, § 192.

[1] Massey *v.* Banner, 1 Jac. & Walk. 245, 248; 3 Chitty on Com. & Manuf. ch. 3, p. 215; Wren *v.* Kirton, 11 Ves. 378; Post, §§ 203, 208, 218.

[2] Ante, § 191; Mallough *v.* Barber, 4 Camp. 150. See also Comber *v.* Anderson, 1 Camp. 523; Park *v.* Hammond, 4 Camp. 344; s. c. 6 Taunt. 495.

[3] Ante, §§ 60, 109; Post, 209, 220; Molloy, B. 3, ch. 8, § 3; 3 Chitty on Com. & Manuf. 205, 206, 216, 218; Littlejohn *v.* Ramsay, 16 Martin, 655; Gilly *v.* Logan, 14 Martin, 196; Hosmer *v.* Beebe, 14 Martin, 368; Richardson *v.* Weston, 16 Martin, 244; Leverick *v.* Meigs, 1 Cowen, 645; Forrestier *v.* Bordman, 1 Story, 43.

[4] Caffrey *v.* Darby, 6 Ves. 494, 495; Malyne, Lex Merc. ch. 16, pp. 81, 82; Childs *v.* Corp. 1 Paine, 286; [Webster *v.* Whitworth, 49 Ala. 201].

[5] 3 Chitty on Com. & Manuf. ch. 3, pp. 218, 219.

agent will not be liable for the acts or omissions of the substitute, appointed or employed by him, unless, indeed, in the appointment or substitution he is guilty of fraud, or gross negligence, or improperly co-operates in the acts or omissions.[1] In many other cases a similar authority arises, by implication, from the conduct of the parties, or from the usage of trade. Thus, for example, it is very common, in certain classes of business, to employ a sub-agent to transact the business of the agency; such as the employment of a broker to buy or sell goods.[2] In all cases of this sort, the agent will not ordinarily be responsible for the negligence or misconduct of the sub-agent, if the employment of the sub-agent is authorized by the principal either expressly or impliedly, by the usage of trade, or the usual dealings between himself and his principal, and he has used reasonable diligence in his choice as to the skill and ability of the sub-agent.[3] The same rule will apply, where the employment, although not so authorized, arises from unforeseen exigencies or emergencies, imposing upon the agent the necessity of employing a sub-agent.[4] But the sub-agent will, under such circumstances,

[1] Foster *v.* Preston, 8 Cowen, 198; Taber *v.* Perrott, 2 Gall. 565; Post, §§ 217 *a*, 232, 333.

[2] Ante, §§ 14, 15; Post, § 217; [Darling *v.* Stanwood, 14 Allen (Mass.), 504].

[3] Goswill *v.* Dunkley, 1 Str. 680; Cochran *v.* Irlam, 2 M. & Selw. 301, note; Pothier, Pand. Lib. 14, tit. 3, n. 18. See also, as to who is to be deemed the principal, and who the agent, and who the sub-agent. Rapson *v.* Cubitt, 9 Mees. & Wels. 710; Quarman *v.* Burnett, 6 Mees. & Wels. 499; Milligan *v.* Wedge, 12 Adolph. & Ellis, 737; Winterbottom *v.* Wright, 10 Mees. & Wels. 109, 111; Post, §§ 453 *a*, 453 *b*, 453 *c*, 454 *a*; Story on Bailm. § 403 *a*. [Thus, where an agent acting for his principal sends orders to commission merchants for the purchase and sale of grain in another city for future delivery in his own name, and receives the money from his principal for the same, and a loss occurs through the fault of the commission merchants, the agent, if he follows his own instructions, will not be liable. Whitlock *v.* Hicks, 75 Ill. 460. So, where agents to ship cotton employed from necessity a shipmaster to carry the cotton, and through the latter's delay a loss occurred, the agents were held not to be liable therefor. McCants *v.* Wells, 3 So. Car. 569; s. c. 4 So. Car. 381; and see Louisville, &c. R. R. Co. *v.* Blair, 1 Tenn. Ch. 351; Williamsburg Fire Ins. Co. *v.* Frothingham, 122 Mass. 391; Com. Bank of N. Orleans *v.* Martin, 1 La. Ann. 344. When, by express agreement between the principal and agent, a sub-agent is employed to receive money for the principal, or even where, by the usage of trade, an authority may be implied for such action on the part of the sub-agent, the plaintiff may treat the sub-agent as his agent and sue him for the money so paid him. Miller *v.* Farmers', &c. Bank, 30 Md. 392; Wicks *v.* Hatch, 62 N. Y. 535. See Strong *v.* Stewart, 9 Heisk. 137. — Ed.]

[4] Bromley *v.* Coxwell, 2 Bos. & Pull. 438; Goswill *v.* Dunkley, 1 Str. 680; Catlin *v.* Bell, 4 Camp. 183; Ante, §§ 85, 118, 141.

be himself directly responsible to the principal for his own negligence or misconduct; for wherever any such express or implied authority to appoint a sub-agent is allowed or given by the principal, a privity is created between them.[1] Under other circumstances, as no privity would exist between them, the sub-agent would be directly responsible only to his immediate employer, the original agent.[2] If, therefore, the agent has actually become responsible to the principal, by the negligence or misconduct of his own sub-agent, and has been compelled to pay damages therefor to the principal, he may recover all that he has been thus compelled to pay, from the sub-agent.[3] We shall hereafter see, that an agent may also, by his own conduct, sometimes render himself responsible for the acts of his sub-agent, and become, in effect, a guarantor for him, and incur an absolute responsibility to his principal for money received by his sub-agent.[4]

§ 202. On the other hand, where the agent has given only the usual credit, or has conducted himself according to the usual course of business, and has employed the usual diligence in his agency, he

[1] Ibid.

[2] See Bromley *v.* Coxwell, 2 Bos. & Pull. 438; Post, §§ 203, note, 217 *a*, 308; Cochran *v.* Irlam, 2 M. & Selw. 301, n. The text contains what I cannot but deem the true doctrine on this point. But there is something in the circumstances of the case of Bromley *v.* Coxwell, 2 Bos. & Pull. 438, which may, perhaps, create a doubt in some minds. See also Lord North's case, Dyer, 161; Solly *v.* Rathbone, 2 M. & Selw. 298; Cull *v.* Backhouse, cited 6 Taunt. 148; Schmaling *v.* Tomlinson, 6 Taunt. 147; Lane *v.* Cotton, 12 Mod. 488; 1 Bl. Comm. 90. See Lockwood *v.* Abdy, 9 Jurist (1845), p. 267. [Thus, where the plaintiffs received a sight draft from another bank and forwarded it to the defendant for collection, the latter presented it to the drawees and received their check, which they put in the clearing-house. When the check reached the drawees on the next day they had failed, but it appeared that they would have paid it the day before if it had been presented to them. It was held that the defendants were liable for negligence. First Nat. Bank of Meadville *v.* Fourth Nat. Bank of N. Y., 14 Am. L. R. 91; Cleaves *v.* Stockwell, 33 Me. 341; Cobb *v.* Becke, 6 Q. B. 930; Robbins *v.* Fennell, 11 Q. B. 248; Bank of Kentucky *v.* Adams Ex. Co., 93 U. S. 174. — Ed.]

[3] Mainwaring *v.* Brandon, 8 Taunt. 202, 204, 205; Post, § 308.

[4] Taber *v.* Perrott, 2 Gall. 565; Post, § 231 *a*. [Where a collection agency are employed to collect a claim and place it in the hands of an attorney, through whose misconduct it is lost, they are liable, in the absence of an express stipulation to the contrary, for their sub-agent's negligence. Morgan *v.* Tener, 83 Pa. St. 305. So, where a similar agent was instructed to transmit a check by express, and he bought a check on N. Y. and sent it by mail instead, and before the check could be returned to N. Y. for collection, the drawer failed, it was held that the agent was liable. Walker *v.* Walker, 5 Heisk. 425. — Ed.]

will not be responsible for any loss occasioned by the subsequent insolvency or fraud of the persons whom he has trusted, or to whom he has sold the property, if, at the time of the sale, they were in good credit.[1] So, if payment is received in the usual manner of conducting the like business transactions, as by receiving a check on a bank from a person in good credit, who should become insolvent before the check could be duly presented; or, by receiving the common currency of the country, which should afterwards become depreciated; in each of these cases, the loss would be the loss of the principal, and not that of the agent.[2] So, if an agent, who is authorized to purchase goods, uses reasonable diligence in the choice and purchase of them, and afterwards they are found to be, or should become, damaged without his default, the loss must be borne by the principal.[3] So, if the goods of the principal are deposited for safety in a proper place, according to the usage of trade, and they are there destroyed by fire or other casualty, the agent is discharged.[4] So, if the money of the principal is deposited in his name in the hands of a banker of good credit, and such a deposit is according to the common usage of the place, or of that business, the agent will not be responsible for any loss arising from the failure of the banker.[5] And this is in conformity to the rule of the Roman law. "Si res pupillares incursu latronum pereat, vel argentarius, cui tutor pecuniam dedit, cum fuisset celeberrimus, solidum reddere non possit; nihil eo nomine tutor præstare cogitur."[6]

§ 203. In the next place, it is the duty of an agent, where the business in which he is employed admits of it, or requires it, to keep regular accounts of all his transactions on behalf of his principal, not only of his payments and disbursements, but also of his receipts; and to render such accounts to his principal at all reasonable times, without any suppression, concealment, or overcharge.[7]

[1] Ante, §§ 187, 191; 3 Chitty on Com. & Manuf. 204, 205, 215, 218; Scott v. Surman, Willes, 406, 407; Smith on Merc. Law, p. 99 (3d ed. 1843).

[2] Molloy, B. 3, ch. 8, § 7; Russell v. Hankey, 6 T. R. 12; Ante, §§ 98, 103, 109, and note, 181.

[3] Mainwaring v. Brandon, 8 Taunt. 202.

[4] Goswill v. Dunkley, 1 Str. 680, 681. See Bromley v. Coxwell, 2 Bos. & Pull. 438; Ante, § 194.

[5] Knight v. Ld. Plymouth, 3 Atk. 480; *Ex parte* Parsons, Ambler, 219; Ante, § 200; Post, § 208; Hammon v. Cottle, 6 Serg. & R. 290.

[6] Dig. Lib. 26, tit. 7, l. 50.

[7] White v. Lady Lincoln, 8 Ves. 369, 370; 3 Chitty on Com. & Manuf. ch. 3, p. 219; Smith on Merc. Law, 47–49 (2d ed.); Id. pp. 94, 95 (3d ed. 1843);

The Roman law, in the like manner, required mandataries and agents to render an account of their doings to their principals, and to pay over to them all the property and proceeds in their hands. "Procurator, ut in cæteris quoque negotiis gerendis, ita et in litibus, ex bona fide rationem reddere debet. Itaque, quod ex lite consecutus erit, sive principaliter ipsius rei nomine, sive extrinsecus ob eam rem, debet mandati judicio restituere." [1]

§ 204. This duty is strictly enforced in courts of equity; and if, by the neglect or omission of this duty, the principal suffers a loss, that loss must be ultimately borne by the agent. When an agent omits to render his account of sales, when reasonably required after the sales are made, he will be presumed to have received the money, and will be accountable therefor; and, in all cases of unreasonable delay, he is generally charged with interest, whether he has made interest or not.[2] But this is properly applicable only to cases where there has been no credit, or the credit has expired; for the

Chedworth *v.* Edwards, 8 Ves. 49; 1 Story on Eq. Jurisp. §§ 468, 623. A sub-agent, employed by an agent, is, in general, only accountable to the agent, and not to the principal; for there is no privity between them. Ante, § 201; Post, § 217; Cartwright *v.* Hateley, 1 Ves. jr. 292; Pinto *v.* Santos, 5 Taunt. 447; Stephens *v.* Badcock, 3 B. & Adolph. 354; Myler *v.* Fitzpatrick, 6 Madd. 360. [An agent is bound to account to his principal for money received by him in the course of his agency for goods sold by his principal on orders obtained by him as such agent, although such sales, as between principal and purchaser, are illegal and void. Baldwin *v.* Potter, 46 Vt. 402, but, *contra*, § 330, Post, n. 3. And where a broker has been in the habit of receiving policies from an insurance company who charge him with premiums which he has collected, he is liable to the company for premiums collected by him, although the company was insolvent when the policies were issued, but not for premiums not received by him on policies delivered to him and not returned to the company. Monitor Mut. Fire Ins. Co. *v.* Young, 111 Mass. 537; Heddens *v.* Younglove, 46 Ind. 212; Eaton *v.* Welton, 32 N. H. 352; Terwilliger *v.* Beals, 6 Lans. 403. And an agent, if he refuses or neglects to return an account, is liable without a previous demand; but after an account has been rendered he cannot be sued without a previous demand having been made. Haas *v.* Damon, 9 Iowa, 589. And a bill in equity will lie by the administrator of a principal against the general agent of his intestate, for a discovery and an account of the transactions between the agent and his principal. Simmons *v.* Simmons, 33 Grat. 451. — Ed.]

[1] Dig. Lib. 3, tit. 3, l. 46, § 4; Pothier, Pand. Lib. 3, tit. 3, n. 55; 1 Domat, B. 1, tit. 15, § 3, art. 8.

[2] 3 Chitty on Com. & Manuf. ch. 3, p. 220; Dodge *v.* Perkins, 9 Pick. 368; —— *v.* Jolland, 8 Ves. 72. See Reid *v.* Van Rensselaer Glass Factory, 3 Cowen, 393; s. c. 5 Cowen, 587. See also Mr. Cowen's note to 3 Cowen, 87; Pope *v.* Barret, 1 Mason, 117; Smith's Compendium of Merc. Law, pp. 94, 95 (3d ed. 1843).

agent is not in any default for not paying over the money, until he has received it.[1]

§ 204 *a*. In the next place, it would seem in general to be the duty of an agent, employed to sell the goods of different persons, such, for example, as a factor, to keep distinct accounts of the sales made for each of them; and if he should sell on credit and take notes for the payment, to take separate notes for the amount due to each principal; for otherwise the rights of each might be essentially changed in case of a failure of due payment, and a difficulty might arise in ascertaining the exact amount of property of each in the respective notes so taken.[2] Without doubt, the usage of trade, or the mode of dealing between the parties, may vary the application of this rule; but it seems in itself equally convenient and equitable, as applied to ordinary cases.[3]

§ 205. So, it is, in many cases, the duty of an agent to keep the property of his principal separate from his own, and not to mix it with the latter; and if he does not keep it separate from his own, in cases where it is properly his duty, and afterwards he is unable to distinguish between the one and the other, the whole will, as a sort of penalty for his negligence, be adjudged to belong to his principal.[4] It is also the duty of an agent, in some cases, to invest the money of his principal, which comes to his hands, so as to yield

[1] See 3 Chitty on Com. & Manuf. ch. 3, p. 220; Bird's Syndic *v.* Dix's Estate, 16 Martin, 254; Leverick *v.* Meigs, 1 Cowen, 645. In Varden *v.* Parker, 2 Esp. 710, Mr. Justice Buller seems to have thought, that if part of the purchase-money only had been received by the agent, the principal could not recover that until the whole transaction was closed, unless the rest was not received by the default of the agent. The doctrine does not seem to have been called for by the facts of the case, and therefore will deserve further consideration. See 3 Chitty on Com. & Manuf. ch. 3, p. 220; [Roosevelt *v.* Doherty, 129 Mass. 301].

[2] Ante, § 179, note; [Clark *v.* Tipping, 9 Beavan, 284].

[3] See Ante, § 179, note; Corlies *v.* Widdifield, 6 Cowen, 181; Jackson *v.* Baker, 1 Wash. Cir. 395, 445; Johnson *v.* O'Hara, 5 Leigh (Va.), 456.

[4] Wren *v.* Kirton, 11 Ves. 377, 382; Fletcher *v.* Walker, 3 Madd. 73; Lupton *v.* White, 15 Ves. 432; 1 Beawes, Lex Merc. *Factors*, pp. 44, 46; 3 Chitty on Com. & Manuf. ch. 3, pp. 215, 220; Smith on Merc. Law, 48–50 (2d ed.); Id. ch. 5, § 2, pp. 95, 96 (2d ed. 1843); Chedworth *v.* Edwards, 8 Ves. 49, 50; 1 Story on Eq. Jurisp. §§ 468, 623; Ersk. Inst. B. 3, tit. 3, § 34; Ante, § 179, n., 204 *a*. [Thus, where executors left money on deposit with bankers who failed and the money was lost, it was held that they were liable to the devisees for mixing the money with their own. Darke *v.* Martyn, 1 Beav. 525; Greene *v.* Haskell, 5 R. I. 447; Mass. L. Ins. Co. *v.* Carpenter, 2 Sweeny (N. Y.), 734. —Ed.]

an interest; in other cases, it is equally his duty to abstain from making any investment. If, in either case, he should violate his proper duty, he would become responsible to his principal. As, for example, if he has omitted to invest, in the former case, he will be made responsible for interest; in the latter case, the principal will be at liberty to reject the investment, and to hold the loss, if any, on the investment, to be the loss of the agent.[1] The duty of investing is sometimes dependent upon the general usage of trade; sometimes upon the particular course of business between the parties; and sometimes upon what may be deemed the law of particular tribunals.[2]

§ 206. In many cases, also, agents become depositaries or stake-holders of property, as well as agents; and in such cases, the ordinary duties of depositaries of the same nature and character belong to them. Thus (as we have seen), factors are depositaries of the goods which they are employed to sell; and therefore they are bound to reasonable skill and diligence in the preservation of them.[3] Auctioneers are also depositaries or stake-holders of both parties of money, paid upon purchases, to remain in their hands, until all the conditions of the sale are fulfilled. Of course they are bound to keep it until that period, as a mutual pledge; and if, before the conditions are fulfilled, it is given up to either party, without the consent of both, they will be responsible for any loss occasioned thereby.[4]

§ 207. It may also be stated, as generally true, that all profits, which are made by an agent in the course of the business of his principal, belong to the latter.[5] Indeed, this doctrine is so firmly

[1] 3 Chitty on Com. & Manuf. ch. 3, p. 218.

[2] Brown *v.* Southouse, cited 3 Bro. Ch. 107. The question, whether interest is to be allowed, in cases of agency, against the agent, or not, is dependent upon a great variety of circumstances. Mr. Cowen, in his learned note to 3 Cowen's Reports, p. 87, has collected many of the authorities. In general, it may be stated, that interest is allowed, wherever it has been, or it might properly have been, made by the agent; and also where, by gross misconduct, he has withheld, or grossly misapplied, the moneys of his principal. [An agent employed to invest money on mortgage cannot invest in a second mortgage without the express consent of his principal, and if he does so without such consent, will be liable for any loss which occurs in consequence of such investment. Whitney *v.* Martine, 6 Abb. (N. Y.) N. C. 72. See Williams *v.* Williams, 11 Heisk. 95; Hun *v.* Cary, 14 Am. L. Rev. 813. — Ed.]

[3] Ante, §§ 33, 110, 186.

[4] 3 Chitty on Com. & Manuf. ch. 3, p. 219; Burrough *v.* Skinner, 5 Burr. 2639; Prevost *v.* Gratz, 1 Peters, Cir. 364.

[5] Ante, § 192; Post, §§ 214, 340. [Thus, where a partner takes the property of the firm and trades with it on his own account, he is held answerable to his

established upon principles of public policy, that no agent will be permitted to take beyond a reasonable compensation for his services, or to hold any profits incidentally obtained in the execution of his duty, even if it be sanctioned by usage.[1] Such a usage has been severely stigmatized, as a usage of fraud and plunder.[2] Where the profits are made by a violation of duty, it would be obviously unjust to allow the agent to reap the fruits of his own misconduct; and where the profits are made in the ordinary course of the business of the agency, it must be presumed, that the parties intended, that the principal should have the benefit thereof.[3]

partners for his profits, as their agent. Coursin's Appeal, 79 Pa. St. 220. See also Moinett *v.* Days, 1 Bax. Tenn. 431; Kimber *v.* Barber, L. R. 8 Ch. App. 56; Byrd *v.* Hughes, 84 Ill. 174; Smith *v.* Stephenson, 45 Ia. 645. But where a town learns that its agent, in a settlement made with the town, has sacrificed its interests to his own, and it has acquiesced for a long time, in such settlement, it was held that it could not recover from the agent his illegal profits. Judevine *v.* Hardwick, 49 Vt. 180. See also Trust Co. *v.* Weed, 14 Am. Law Rev. 456; Lafferty *v.* Jelley, 22 Ind. 471. — Ed.]

[1] 3 Chitty on Com. & Manuf. ch. 3, pp. 216, 221; Diplock *v.* Blackburn, 3 Camp. 43, 44; Smith on Merc. Law, 49 (2d ed.); Id. ch. 5, § 2, pp. 91, 92 (3d ed. 1843); Massey *v.* Davies, 2 Ves. jr. 317; —— *v.* Jolland, 8 Ves. 72; Ante, § 192.

[2] Diplock *v.* Blackburn, 3 Camp. 44.

[3] Ante, § 192; Post, §§ 210, 211. [Thus, where an agent holding a note and mortgage for sale, was offered $4,800 therefor, and afterwards purchased the same of his principal for $4,500, without disclosing the offer he had received, it was held that he must account to his principal for the profits. Mason *v.* Bauman, 62 Ill. 76. So, where the plaintiff and defendant wished to buy certain land, and the defendant proposed to the plaintiff that they should act together, and that he should buy the land, as he could do so at an advantage; and he thereupon bought fifty acres, for which he paid ten dollars per acre, and charged the plaintiff fifteen therefor; it was held that he bought as agent, and could not charge him the advanced price. Wilson *v.* Wilson, 4 Abb. (N. Y.) App. Cas. 621. So, where plaintiff consigned a ship to agents in China for sale, fixing a minimum price, and requiring cash payment; and the agents employed defendant in Japan to sell, with the same instructions, who took her himself at the price fixed and resold her to a Japanese prince for nearly double the sum he paid for her; it was held that he must account to the plaintiff for the profits. De Bussche *v.* Alt, L. R. 8 Ch. Div. 286. So, where a broker who was employed to purchase a ship as cheaply as possible, received from the vendor a large commission for making the purchase, it was held that he must account to his principal for the amount received, Morison *v.* Thompson, L. R. 9 Q. B. 480; and in such a case the broker is liable without previous demand, Love *v.* Hoss, 62 Ind. 255. See Dodd *v.* Wakeman, 26 N. J. Eq. 484; Morrison *v.* Ogdensburgh, &c. R. R. Co., 52 Barbour, 173; Minn. Central R. R. Co. *v.* Morgan, 52 Barbour, 217; Markwick *v.* Hardingham, 43 Law T. Rep. N. S. 647; Dutton *v.* Willner, 52 N. Y. 312; Armstrong *v.* Elliott, 29 Mich. 485; Cottom *v.* Holliday, 59 Ill. 176; Price *v.* Keyes, 62 N. Y. 378. — Ed.]

§ 208. Besides the particular duties of agents, which have been already incidentally stated, there are others, which seem to be the proper result of law; and a deviation from them can only be justified by some clear usage of business, or by the sanction of the principal, or by an overruling necessity.[1] Thus, in regard to agents receiving money for their principals, it seems (as has been already suggested), a clear duty, if they deposit the money in the hands of bankers, to deposit it in the name of their principals, and not in their own names; and if they adopt the latter course, and the bankers should become insolvent, the agents would become personally responsible for the loss.[2] So, it is the duty of agents to keep their principals apprised of their doings, and to give them notice, within a reasonable time, of all such facts and circumstances, as may be important to their interests; and if, by neglect of the agent, the principal suffers a loss, he is entitled to be indemnified by the agent.[3] Thus, for example, it is the duty of an agent, to whom a bill of exchange is remitted for acceptance to give notice to his employer of the acceptance or non-acceptance of the bill, by the earliest reasonable opportunity.[4] So, an agent

[1] Ante, §§ 85, 118, 141, 194, 201; Post, 237.

[2] Ante, § 202; Post, § 218; Caffrey *v.* Darby, 6 Ves. 496; Massey *v.* Banner, 1 Jac. & Walk. 241; 4 Madd. 413; Wren *v.* Kirton, 11 Ves. 377, 382; Fletcher *v.* Walker, 3 Madd. 73; 3 Chitty on Com. & Manuf. ch. 3, p. 215; Macdonnell *v.* Harding, 7 Sim. 178; Hammon *v.* Cottle, 6 Serg. & R. 290. [Where an agent deposits in his own name the money of his principal in a bank without express authority for such action, such deposit was held to be a conversion of the money, and the agent takes all the risks attending such deposit. Sargeant *v.* Downey, 49 Wisc. 524. See People *v.* Green, 23 Hun, 280; Cartmell *v.* Allard, 7 Bush (Ky.), 482; Norris *v.* Hero, 22 La. An. 605. And where an agent intermingles his principal's money with his own and it is lost, the loss falls upon him, Darke *v.* Martyn, 1 Beav. 525: and where it is so deposited in a bank and mixed with his own money deposited there, any depreciation in the bank bills falls upon the agent depositing, Marine Bank *v.* Fulton Bank, 2 Wall. 252. But where the agent received Confederate money under such circumstances, it was held, that he was not liable for their depreciation, for the reason that he did not make a special deposit. Ansley *v.* Anderson, 35 Ga. 8; Duguid *v.* Edwards, 50 Barb. 288; Webster *v.* Pierce, 35 Ill. 159; Bartlett *v.* Hamilton, 46 Me. 425. — Ed.]

[3] Malyne, Lex Merc. 82; 3 Chitty on Com. & Manuf. ch. 3, pp. 219, 220; Arrott *v.* Brown, 6 Wharton, 9; Devall *v.* Burbridge, 4 Watts & Serg. 305; Harvey *v.* Turner, 4 Rawle, 229; Forrestier *v.* Bordman, 1 Story, 43, 56; [Moore *v.* Thompson, 9 Phil. 164; Pierce *v.* Chicago, &c. R. R. Co., 36 Wisc. 283].

[4] Beawes, Lex Merc. tit. *Bills of Exchange*, p. 480, § 117; Crawford *v.* Louisiana State Bank, 13 Martin, 214, 706; Montillat *v.* Bank of the United

employed to purchase goods abroad, or goods to be shipped abroad, is bound to transmit the bill of lading to his employer as soon as possible, or at least within a reasonable time.[1] It has also been laid down, as the duty of a bill-broker, or other person, to whom a bill is remitted on commission, first, to endeavor to procure acceptance; secondly, on refusal, to protest the bill for non-acceptance; thirdly, to advise the remitter of the receipt, acceptance, or protest; and in case of the latter, to send the protest to him; and, fourthly, to advise any third person that is concerned; and all this is to be done without delay; or, as Beawes expresses it, by the post's return without further delay.[2] But it is far from being clear, that all these are strictly his duties in all cases; and it is certain, that there are others equally imperative. Indeed, the duties properly belonging to such agencies are most naturally affected and qualified by the usages of trade, and the particular dealings between the parties. Thus, for example, unless there be a clear usage of trade, it seems hardly to be a part of such an agent's duty, to give advice to third persons of the receipt, or acceptance, or refusal of acceptance, of a bill, although it is his duty to give such advice to his employer.[3] And it seems quite as much the duty of such an agent to present the bill for payment, if accepted, and to give notice of the payment, or non-payment, and in the latter case, to protest the bill, as it is to perform the other duties already enumerated.[4]

§ 209. And this leads us to the remark, which, indeed, has been already anticipated in the preceding pages, that there are certain duties appropriate, and belonging to certain classes of agencies, resulting either from the general usages of business, or the habits of dealing between the parties, or the special functions to be performed, which cannot be deemed of universal application or obligation. Thus, for example, there are peculiar duties, and peculiar functions, belonging to auctioneers, to brokers, to factors, to masters of ships, to ships'-husbands, and even to particular agents, ar-

States, 13 Martin, 365; Miranda *v.* City Bank of New Orleans, 6 Miller (La.), 740; Pritchard *v.* Louisiana State Bank, 2 Miller (La.), 415; Durnford *v.* Patterson, 7 Miller (La.), 464; Canonge *v.* Louisiana State Bank, 15 Martin, 344.

[1] Barker *v.* Taylor, 5 Mees. & Wels. 527.

[2] Beawes, Lex Merc. p. 430, § 117; Arrott *v.* Brown, 6 Whart. 9.

[3] See Ante, §§ 199, 200.

[4] Ante, § 200.

ranged under the same general denomination, such as ship-brokers, bill-brokers, stock-brokers, insurance-brokers, supercargoes, and commission-merchants, with or without a *del credere* commission.[1] In some of these cases, the law (as we have already seen) has prescribed, or recognized, particular duties as positively obligatory; in other cases, they are to be gathered from analogous principles, or are dependent upon the usages and habits of trade, to be ascertained as matters of fact.[2] Thus, for example, it is now settled, as a matter of law, that auctioneers can sell goods only for ready money; but that factors may sell upon credit.[3] In the first case, the general rule of law is strictly adhered to, that all sales must be for cash, unless there is a usage of trade which relaxes the rule, and governs the sale. In the latter case, the right of a factor to sell upon credit, although formerly a matter of fact and usage, and to be ascertained as such, is now treated as an undeniable principle of law, and incidental to the agency, in the absence of all contradictory proofs.[4] A minute enumeration of the particular duties of all classes of agents would not be of any great utility, even if it were a practicable task. But in the present state of the law, it must necessarily be very imperfect, and derived mainly from general principles, which must, of course, undergo many modifications, to adapt them to the exigencies of each agency.[5]

§ 210. In this connection, also, it seems proper to state another rule, in regard to the duties of agents, which is of general appli-

[1] Beawes, Lex Merc. vol. 1, pp. 44–49, 4to (6th ed.).

[2] Ante, §§ 26–37.

[3] 3 Chitty on Com. & Manuf. 199; Ante, §§ 27, 60, 108, 110; Post, § 226.

[4] Ante, §§ 108, 110; [Daylight Burner Co. *v.* Odlin, 51 N. H. 56].

[5] The learned reader will find in Malyne's Lex Mercatoria, ch. 16, pp. 81–86, much information as to the practical duties of factors; and in 1 Liverm. on Agency, ch. 3, pp. 67–78 (ed. 1818), in Paley on Agency, by Lloyd, pp. 18–24, and in Beawes, Lex Mercatoria, pp. 44–49 (6th ed.), the like information, as to these and other mercantile agencies. But, as a specimen, how little can be attained in practical utility by any general statements, we select the following passage from Mr. Livermore, as to the general duty of a factor: "The general duty of a factor is to procure the best intelligence of the state of trade at his place of residence; of the course of exchange; of the quantity and quality of goods at market; their present price, and the probability that it may rise or fall; to pay exact obedience to the orders of his employers; to consult their advantage in matters referred to his discretion; to execute their business with all the despatch that circumstances will admit; to be early in his intelligence, distinct in his accounts, and punctual in his correspondence." See also 1 Bell, Comm. §§ 407–418; Id. §§ 432–436 (4th ed.); Id. pp. 477, 478, 481, 482 (5th ed.); [Clarke *v.* Tipping, 9 Beav. 284].

cation, and that is, that in matters touching the agency, agents cannot act, so as to bind their principals, where they have an adverse interest in themselves.[1] This rule is founded upon the plain and obvious consideration, that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence, and zeal of the agent, for his own exclusive benefit.[2] It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interests of his principal, as far as he lawfully may; and, even if impartiality could possibly be presumed on the part of an agent, where his own interests were concerned, that is not what the principal bargains for; and, in many cases, it is the very last thing which would advance his interests.[3] The seller of an estate must be presumed to be desirous of obtaining as high a price as can fairly be obtained therefor; and the purchaser must equally be presumed to desire to buy it for as low a price as he may. It has been said by Cujacius: "Hæc scilicet est natura contractûs emptionis et venditionis, ut vendat unus quanto pluris, emat alter quanto minoris potest,"[4] or, more briefly, in another

[1] [An agent of a railway corporation, charged with the duty of selecting a route or line of railway, cannot, for a consideration paid to himself, agree to select a particular route; and such contract would be void. Holliday *v.* Davis, 5 Oregon, 40. So, where a gratuity was given to an agent by a party with whom the agent subsequently made a contract for his principal, in which he assented to stipulations prejudicial to the interests of his principal, it was held that such contract was voidable at the principal's option. Smith *v.* Sorby, L. R. 3 Q. B. D. 552. Stone *v.* Hayes, 3 Denio, 575. Nor can an agent, having charge of his principal's real estate, acquire a valid tax title thereto, as against his principal, even though the latter has failed to furnish money to pay the taxes. Bowman *v.* Officer, 53 Iowa, 640; Curts *v.* Cisna, 7 Biss. 260. So, where A. had stock to sell, and a broker represented to him that he could obtain for the stock a certain price, which was in fact smaller than the sum actually offered to the broker, and A. understood that the price was the highest which could be got for the stock, it was held that A. could recover the price of the stock which the parties actually paid. Cutter *v.* Demmon, 111 Mass. 474. See also Dunne *v.* English, L. R. 18 Eq. 524; Hughes *v.* Washington, 72 Ill. 84; Tynes *v.* Grimstead, 1 Tenn. Ch. 508; Montgomery *v.* Pickering, 116 Mass. 227; Bank *v.* Mills, 24 Kansas, 604; Cottom *v.* Holliday, 59 Ill. 176. — Ed.]

[2] 3 Chitty on Com. & Manuf. 216, 217; Church *v.* Mar. Ins. Co. 1 Mason. 341; Shepherd *v.* Percy, 16 Martin, 267; Parkhurst *v.* Alexander, 1 John. Ch, 394; Beale *v.* McKiernan, 6 Miller (La.), 407; 1 Story, Eq. Jurisp. §§ 315, 316, 316 *a*; Copeland *v.* Merchants' Ins. Co. 6 Pick. 198, 204; Ante, § 10.

[3] 3 Chitty on Com. & Manuf. 216, 217; Beale *v.* McKiernan, 6 La. 407; Gillett *v.* Peppercorne, 3 Beav. 78, 83, 84; Ante, § 10.

[4] Cujac. Opera, Tom. 4, col. 968, ad. Lib. 3, Resp. Pap. (ed. Neap. 1758); Ante, § 10, note.

place: "Ut emptor votum gerat emendi minoris, et venditor pluris vendendi;"[1] or more pointedly still: "Emptor emit, quam minimo potest; venditor vendit, quam maximo potest."[2] Without going to the full length of the statement of Pomponius, as adopted in the pandects, that, in regard to price, the parties may lawfully circumvent each other, if that word is to be understood in its offensive sense: "In pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire;"[3] it may be correctly said, with reference to Christian morals, that no man can faithfully serve two masters, whose interests are in conflict. If, then, the seller were permitted, as the agent of another, to become the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other; and thus a temptation, perhaps, in many cases, too strong for resistance by men of flexible morals, or hackneyed in the common devices of worldly business, would be held out, which would betray them into gross misconduct, and even into crime. It is to interpose a preventive check against such temptations and seductions, that a positive prohibition has been found to be the soundest policy, encouraged by the purest precepts of Christianity. This doctrine is well settled at law;[4] but it is acted upon in courts of equity to a much larger extent, not only in cases of persons, confidentially intrusted with the management of the property of others; but in cases of other relations of a confidential nature, involving the rights and interests of the employer.[5] And it is by no means necessary, in cases of this sort, that the agent should have made any advantage by the bargain. Whether he has so or not, the bargain is equally without any obligation to bind the principal.[6] Of course it is to be understood, as a proper qualification of the

[1] Cujac. Opera, Tom. 10, col. 1005, in IV. Lib. Prior. Cod. Lib. 4, tit. 44, § 8 (ed. Neap. 1759).

[2] Cujac. ad Dig. Lib. 4, tit. 4, l. 16, § 4; De Minor. Vig. Quin. Ann. (Tom. 1, col. 998), cited 1 Liverm. on Agency, 417 (ed. 1818). I have not found the very passage, after some search. But there is a passage to the same effect in Cujac. Comm. in Lib. 3, Resp. Pap. ad § Cum. inter. [Dig. Lib. 46, tit. 1, l. 51, § 4]; Cujac. Opera, Tom. 4, p. 963 (ed. Neap. 1758); Ante, § 10, note.

[3] Dig. Lib. 4, tit. 4, l. 16, § 4; Ante, § 10; Post, § 213.

[4] Taylor *v.* Salmon, 4 Mylne & Craig, 134.

[5] 1 Story on Eq. Jurisp. §§ 308–328; Huguenin *v.* Baseley, 14 Ves. 290; Baker *v.* Whiting, 3 Sumner, 476; Ante, § 10; Post, §§ 211–213; [Poillon *v.* Martin, 1 Sandf. Ch. 569].

[6] Campbell *v.* Walker, 5 Ves. 680; *Ex parte* James, 8 Ves. 348; *Ex parte* Bennett, 10 Ves. 385; Cane *v.* Allen, 2 Dow, 289; *Ex parte* Lacey, 6 Ves. 625; 1 Story, Eq. Jurisp. §§ 315, 316, 316 *a*.

doctrine, that the principal has an election to adopt the act of the agent or not; and that if, after a full knowledge of all the circumstances, he deliberately and freely ratifies the act of the agent, or acquiesces in it for a great length of time, it will become obligatory upon him; not by its own intrinsic force, but from the consideration, that he thereby waives the protection intended by the law for his own interests, and deals with his agent, as a person, *quoad hoc* discharged of his agency.[1]

§ 211. Hence, it is well settled (to illustrate the general rule), that an agent, employed to sell, cannot himself become the purchaser; and an agent employed to buy, cannot himself be the seller.[2] So, an agent employed to purchase cannot purchase for

[1] 3 Chitty on Com. & Manuf. ch. 3, pp. 216, 217; Woodhouse *v.* Meredith, 1 Jac. & Walk. 204, 224; Morse *v.* Royal, 12 Ves. 355; Lowther *v.* Lowther, 13 Ves. 95, 103; Saunderson *v.* Walker, 13 Ves. 601.

[2] Ante, § 10; 1 Story, Eq. Jurisp. §§ 315, 316, 316 *a*; 3 Chitty on Com. & Manuf. ch. 3, pp. 216, 217; 1 Liverm. on Agency, ch. 8, § 6, pp. 416–433 (ed. 1818); Lees *v.* Nuttall, 1 Russ. & Mylne, 53; s. c. 2 Mylne & Keen, 819; Copeland *v.* Merc. Ins. Co. 6 Pick. 198; Reed *v.* Warner, 5 Paige, 650; Lowther *v.* Lowther, 13 Ves. 103; Reed *v.* Norris, 2 M. & Craig, 374; Beal *v.* McKiernan, 6 Miller (La.), 407; Bartholomew *v.* Leach, 7 Watts, 472.

[*Agent as Seller.* — A broker cannot, while employed by a party to purchase goods for him, buy them of himself, even if he acted in good faith, and sold him the goods at the market price. Taussig *v.* Hart, 58 N. Y. 425; Tewksbury *v.* Spruance, 75 Ill. 187; Bentley *v.* Craven, 18 Beavan, 75. In Sharman *v.* Brandt, L. R. 6 Q. B. 720, the broker was authorized by his principals to buy for them in the market 200 tons of hemp. He drew up and forwarded to his principals a broker's contract note, but he, in fact, had no principal as seller in the transaction. Martin, B., said: "If a man employ another as broker to go into the market and purchase goods for him at a certain price, the other could not, under such authority, make himself a principal in the contract of sale and purchase;" and it was held that there was no contract: so in the case of a similar sale of stock by a broker, it was held that the principal might repudiate the transaction and return the stock, even though it had become worthless, and recover back the consideration. Conkey *v.* Bond, 34 Barbour, 276.

Agent as Purchaser. — Nor can an agent employed to sell real estate or other property become the purchaser, nor acquire any interest in the property, unless the principal is fully informed of the fact and assents to it, Audenreid *v.* Walker, 11 Phil. 183; Bain *v.* Brown, 56 N. Y. 285; Tate *v.* Williamson, L. R. 2 Ch. 55; Jeffries *v.* Wiester, 2 Sawyer, 135; Ingle *v.* Hartmann, 37 Ia. 274: and this rule applies even where he is authorized to sell at a stipulated price, Ruckman *v.* Bergholz, 37 N. J. L. 437. And it has been held that the clerk of a broker employed to make a sale of land, who has access to the correspondence between his principal and the vendor, stands in such a relation of confidence to the latter that, if he becomes the purchaser, he is chargeable as trustee for the vendor, Gardner *v.* Ogden, 22 N. Y. 327: so, where an agent

himself.[1] So, a trustee cannot, ordinarily, become the purchaser of the estate of his *cestui que trust*.[2] And it will make no difference,

buys property under a judgment sale, he holds it as trustee for his principal if he pays for it with his principal's money, or purchases for himself for less than the amount of the debt, Eshleman *v.* Lewis, 49 Pa. St. 410: so, a purchase of land at an administrator's sale by the administrator himself, through a third party, has been held to be voidable at the election of the heirs of the intestate, Ives *v.* Ashley, 97 Mass. 198; Greene *v.* Haskell, 5 R. I. 447: and where, in such a case, the agent has used the name of another person as purchaser instead of his own, this has been held sufficient in equity to invalidate the transaction, and no proof of undervalue was necessary, Lewis *v.* Hillman, 3 H. L. Cas. 607; Trevelyan *v.* Charter, 9 Beavan, 140: and so, where one tenant in common of real estate is intrusted with its sale, he cannot convey it to a third party, himself being the real purchaser, Eldridge *v.* Walker, 60 Ill. 230; see also Haynie *v.* Johnston, 71 Ind. 394: but where a husband is acting as his wife's agent for the sale of her real estate, and has sold the same in good faith, he may afterwards acquire the title from the purchaser, Walker *v.* Carrington, 74 Ill. 446: and it has been held that the agency of a real-estate agent, and his duty to his principal, ceases upon the delivery of the title papers and payment for the property sold; and the agent can afterwards purchase the property for himself, Walker *v.* Derby, 5 Biss. 134: so the financial officer of a bank is not disqualified from purchasing for his own benefit property pledged to the bank for a debt, if the sale is for a price sufficient to discharge the lien, and he is not liable to the bank for any profit which he may have made by buying at that price, Smith *v.* Lansing, 22 N. Y. 520; Cumberland Co. *v.* Sherman, 30 Barb. 553; Murphy *v.* O'Shea, 2 J. & L. 422. See Salomans *v.* Pender, 3 H. & C. 639.

Agent acting for both Parties. — Where a contract is made by one who is acting as the agent of both parties, it may be avoided by either principal. Mercantile Ins. Co. *v.* Hope Ins. Co., 14 Am. L. Rev. 330. It has been held, however, that where each party knows that the agent is acting for the other party, and with this knowledge employs him, the defendant can recover compensation from both parties. Alexander *v.* N. W. University, 57 Ind. 466; Meyer *v.* Hanchett, 39 Wisc. 419; Lynch *v.* Fallon, 11 R. I. 311. So, where an express company receives goods directed in a peculiar manner to its agent at a certain place, it was held that the shipper intended by his language to make the company's agent his own agent for receiving the goods, and the company was discharged from responsibility in delivering the goods to such agent. Fitzsimmons *v.* Southern Ex. Co., 40 Ga. 330. But where a railroad company was indebted to a bank, and sold to such bank a quantity of railroad ties in part payment of the debt, and such sale was made with the assent of the vice-president of the railroad company, who was also president of the bank, and acted for the latter in making the purchase, it was held that he could not act as the agent both for the bank and railroad company, and the sale was invalidated

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[1] Taylor *v.* Salmon, 4 Mylne & C. 134.

[2] Ante, § 210; Baker *v.* Whiting, 3 Sumner, 476; [Bradley *v.* Farwell, 1 Holmes, 433. The directors of an insolvent corporation held the position of trustees of its assets for the benefit of creditors, and, if creditors themselves, cannot secure to themselves any preference over other creditors. — Ed.]

whether he is sole trustee, or joined with others in the trust.[1] So, the assignee of a bankrupt cannot become a purchaser of the debts or estate of the bankrupt on his own account.[2] And, if he does purchase, it will be a trust for the benefit of the creditors; for he is treated as an agent for the creditors, in all matters touching the estate of the bankrupt.[3] So, an executor or administrator cannot buy any of the debts of the deceased for his own benefit; but the benefit will belong to those interested in the estate.[4] So, a surety, purchasing the debt, cannot avail himself of the purchase, against his principal, for more than he has paid; but he will be held as a *quasi* trustee.[5] So, the master of a ship purchasing the ship at a sale by public authority, cannot purchase for himself, unless the owner afterwards elects to allow him the right.[6] So, an agent employed to settle a debt, cannot purchase it upon his own account; for he is bound to purchase it upon the best terms which he can, for the benefit of his principal; and it would hold out a temptation to him to violate his duty, if he were permitted to purchase for himself.[7] For the like reason, an agent of the seller

thereby. Walworth Bank *v.* Farmers' Co., 16 Wisc. 629; Ballston Spa Bank *v.* Marine Bank, 16 Wisc. 120. And public officers are held to be agents so as to be within the rule prohibiting agents from acting for themselves and for their principals in the same transaction. People *v.* Overyssel, 11 Mich. 222; N. Y. Cent. Ins. Co. *v.* Nat. Prot. Ins. Co., 20 Barbour, 470. So, a general authority given by the directors to the president of a bank to certify checks drawn upon him, will not allow him to certify checks drawn by himself. Claflin *v.* Farmers' Bank, 25 N. Y. 293; Titus *v.* Gt. Western Turnpike, 5 Lansing, 250; Lloyd *v.* Colson, 5 Bush (Ky.), 587; Mullen *v.* Keetzleb, 7 Bush (Ky.), 253. — ED.].

[1] 1 Story on Eq. Jurisp. §§ 314, 316, 321, 322; Parkhurst *v.* Alexander, 1 John. Ch. 394; Cane *v.* Allen, 2 Dow, 289; Campbell *v.* Walker, 5 Ves. 680; *Ex parte* James, 8 Ves. 348; *Ex parte* Bennett, 10 Ves. 385; *Ex parte* Lacey, 6 Ves. 625; Whichcote *v.* Lawrence, 3 Ves. 740; Davoue *v.* Fanning, 2 John. Ch. 251, 260; Green *v.* Winter, 1 John. Ch. 27.

[2] [But it seems this may be done if there be no fraud. Fisk *v.* Barber, 6 Watts & Serg. 8. So, of a guardian buying the estate of his ward at a *public* sale. Chorpenning's Appeal, 32 Penn. St. 315.]

[3] *Ex parte* Lacey, 6 Ves. 625, 628; 1 Story on Eq. Jurisp. §§ 321, 322.

[4] *Ex parte* Lacey, 6 Ves. 625, 628, 629; 1 Story on Eq. Jurisp. §§ 321, 322. [But see Fisher's Appeal, 34 Penn. St. 29.]

[5] Reed *v.* Norris, 2 M. & Craig. 374; 1 Story on Eq. Jurisp. §§ 321, 322, 324.

[6] Chamberlain *v.* Harrod, 5 Greenl. 420; Church *v.* Marine Ins. Co. 1 Mason, 341; Barker *v.* Marine Ins. Co. 2 Mason, 369; The Schooner Tilton, 5 Mason, 465, 480; Copeland *v.* Merch. Ins. Co. 6 Pick. 198.

[7] Reed *v.* Norris, 2 M. & Craig, 361, 374; 1 Story on Eq. Jurisp. §§ 321, 322.

cannot become the agent of the purchaser in the same transaction.[1] So, an agent who discovers a defect in the title of his principal to lands, cannot misuse it to acquire a title for himself, but will be held a trustee for his principal.[2] Indeed, it may be laid down

[1] Wright *v.* Dannah, 2 Camp. 203; Dixon *v.* Bromfield, 2 Chitty, 205; Ante, § 207.

[2] Ringo *v.* Binns, 10 Pet. 269. Mr. Smith, in his Compendium of Mercantile Law, has summed up the doctrine on this matter in a very exact manner: "It has been already said, in the chapter on partnership, that, from a person standing in a situation of confidence with regard to another, the strictest good faith is required. This maxim applies in full force to agents, of whose morals the law is so careful, that it will not suffer them even to incur temptation: thus, an agent employed to sell is not allowed to be the purchaser, at least not unless he make known that he intends to become such, and furnish his employer with all the knowledge he himself possesses, or unless the court, perceiving that the principal would lose by a resale, think fit on that account to uphold the transaction; so neither can an agent, employed to purchase, be himself the seller, unless there was a plain understanding between him and his principal to that effect. And if an agent, who is employed to purchase, purchase for himself, he will be considered a trustee for his principal. This is in accordance with the rule of the civilians. Tutor rem pupilli emere non potest; idemque porrigendum est ad similia, id est, ad curatores, procuratores, et qui negotia aliena gerunt. Dig. Lib. 18, tit. 1, l. 34, § 7." — p. 93 (3d ed. 1843). [So, an agent or director of a corporation who is employed to examine and ascertain how much and what part of his principal's land can be sold without inconvenience, and to report his proceedings to his principal, cannot purchase such part and take a conveyance to himself; nor can he act for another in making such purchases. Cumberland Coal Co. *v.* Sherman, 30 Barb. 553. Davies, J., there said in an elaborate judgment: "The cases relating to the dealings of an agent or trustee with the property, in reference to which his agency or trust exists, may be arranged into two classes. *First.* Cases in which a trustee buys or contracts with himself, or several trustees of which he is one, or a board of trustees of which he is one; and it will be seen by reference to the authorities hereinafter cited, that the incapacity to purchase applies to all these cases. *Second.* Cases in which a trustee buys of, or contracts with, his *cestui que trust* who is *sui juris*, and is competent to deal independently of the trustee, in respect to the trust estate.

"As to the first class of cases, the purchase or contract is voidable at the option of the *cestui que trust*, without reference to the fairness or unfairness of the purchase or contract. The leading case in this state, and which has been followed without qualification, so far as I have been able to ascertain, is that of Davoue *v.* Fanning, 2 John. Ch. 252. In that case, an executor, on making sale of the real estate of his testator, caused the same to be purchased for his wife, and conveyed to her. The sale was made at public auction and for a fair price, and was *bonâ fide*. Yet the sale was set aside at the instance of the *cestui que trust;* and it will be observed that the trustee was not the purchaser, but a third person, for the benefit of his wife. Chancellor Kent says: 'Whether a trustee buys in for himself or his wife, the tempation to abuse is nearly the same. Though the money he was raising was to go to his wife, it was no reason why he should be permitted to buy in for her the *estate itself*. His

as a general principle, that, in all cases where a person is, either actually or constructively, an agent for other persons, all profits

interest interfered with his duty. . . . The case, therefore, falls clearly within the spirit of the principle, that if a trustee, acting for others, sells an estate, and becomes himself interested in the purchase, the *cestui que trust* is entitled to come here, *as of course*, and set aside that purchase, and have the property re-exposed to sale.' Chancellor Kent then proceeds to review the cases bearing on this point, commencing with that of Holt *v.* Holt, in the time of 22 Car. II., where it was held that if an executor renew a lease in his own name on its expiration, the renewed lease is to be for the benefit of the *cestui que trust*.

"And in Davison *v.* Gardner, in 1748, Lord Hardwicke observed, that the court always looks with a jealous eye at a trustee purchasing of his *cestui que trust;* and in Whelpdale *v.* Cookson, in 1747 (1 Ves. 9; s. c. 5 Id. 682), the chancellor would not permit a purchase at auction to stand, as he said he knew the dangerous consequence of sanctioning dealings of a trustee with the property of the *cestui que trust*. In Campbell *v.* Walker, 5 Ves. 678, the master of the rolls says: 'I will lay down the rule as broad as this, and I wish trustees to understand it, that any trustee purchasing trust property is liable to have the purchase set aside, if, in any reasonable time, the *cestui que trust* chooses to say he is not satisfied with it.' He adds, 'They must buy with that clog.'

"So in Munro *v.* Allaire, 2 Caines's Cases in Error, 183, Benson, J., in delivering the opinion of the court, says: 'It is a principle *that a trustee can never be a purchaser*, and I assume it as not requiring proof that this principle must be admitted, not only as established by adjudication, but also as founded in indispensable necessity to prevent that great inlet of fraud, and those dangerous consequences, which would ensue if trustees might themselves become purchasers, or if they were not in every respect kept within compass. Although it may, however, seem hard that the trustees should be the only persons of all mankind who may not purchase, yet, for the very obvious consequences, it is proper that the rule should be strictly pursued, and not in the least relaxed.' Chancellor Kent says, that he cannot but notice the precision and accuracy with which the rule and the reason of it are here stated.

"Chancellor Kent says that there is one more important case, that of The York Building Company *v.* Mackenzie, decided in the House of Lords in 1795, on appeal from the Court of Session in Scotland. It had then only appeared in 8 Bro. P. C. by Tom. in App. but has since been reported in 3 Paton, 378. The appellants were an insolvent company, and their estate was sold by the order of the Court of Session, at a public judicial sale, to satisfy creditors. The course, at such sales, is to set up the property at a value fixed upon by the court, which is called the up-set price, and which is founded on information procured by the common agent of the court, who has the management of all the out-door business of the cause. The respondent in the case was the common agent, and he purchased for himself at the up-set price, no person appearing to bid more, and the sale was confirmed by the court; and in the course of eleven years' possession he had expended large sums for building and improvements. There was no question as to the fairness or integrity of the purchase. The object of the appellant was to set aside the sale, on the ground that the purchaser was the common agent in behalf of all parties to procure information and attend the sale, and was in the nature of a trustee, and so disabled the purchase. On the part of the appellants, it was contended that

and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employers.[1]

the sale in question was *ipso jure* void and null, because the respondent, from his office of common agent, was under a disability and incapacity, which precluded him from being a purchaser. The office of common agent, in a ranking and sale, infers a natural disability, which, *ex vi termini*, imparts the highest legal disability, because a law which flows from nature, being founded on the reason and nature of the thing, is paramount to all positive law. The principle is obvious. He cannot be both judge and party. He cannot be both seller at a roup and buyer; he cannot serve two masters. These views were not controverted by the counsel on the other side, but they insisted the sale could be maintained upon other grounds. After an argument of sixteen days, the case was decided in the House of Lords, opinions being given by Lord Thurlow and Lord Chancellor Loughborough. Lord Thurlow said, on this point, that all the gentlemen admit that it was the duty of the agent to carry on the sale to the utmost advantage, for the benefit of the creditors, and those interested in the residue; and, taking it to be so, one side said, that being your situation, it is utterly impossible for you to perform that duty in such a manner as to derive an advantage to yourself. This seems to be a principle so exceedingly plain, that it is in its own nature indisputable, for there can be no confidence placed unless men will do the duty they owe to their constituents, or be considered to be faithfully executing it, if you apply an arbitrary rule. In these views the lord chancellor concurred, and the sale was set aside. Lord Eldon and Sir W. Grant designate this as *the* great case, and repeatedly refer to it. In Jeffrey *v.* Aitken, decided in June, 1826, the lord ordinary observed, it is impossible to hold that the seller can also be the buyer of the subject, after the judgment of the House of Lords in the case of The York Building Company *v.* Mackenzie, decided May 13, 1795.

"In Taylor *v.* Watson, decided in Scotland, Jan. 20, 1846, the same rule as laid down in Mackenzie's case was reiterated and adhered to.

"In the case of the Aberdeen Railway Company *v.* Blaikie, July 20, 1854 (1 McQueen, 461), the House of Lords, reversing the judgment of the court below, held that a contract entered into by a manufacturer, for the supply of iron furnishings to a railway company of which he was a director, or the chairman at the date of the contract, was invalid and not enforceable against the company. Lord Cranworth, in delivering the opinion of the court, says: 'A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation, whose affairs

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[1] East India Co. *v.* Henchman, 1 Ves. jr. 289; Massey *v.* Davies, 2 Ves. jr. 317; 8 Chitty on Com. & Manuf. 221; Campbell *v.* Penn. Life Ins. Co. 2 Whart. 64; Bartholomew *v.* Leach, 7 Watts, 472. [Where a gift is made by the principal to an agent, the transaction is regarded with great suspicion, and unless it appears that the grantor acted with full knowledge and deliberation, and under advice other than that of the grantee, such gifts will be held invalid. Hunter *v.* Atkins, 3 M. & K. 113; Hatch *v.* Hatch, 9 Vesey, 296; Toker *v.* Toker, 31 Beavan, 629; Watt *v.* Grove, 2 Sch. & Lef. 492; Uhlich *v.* Muhlke, 61 Ill. 499; Neilson *v.* Bowman, 29 Grat. (Va.) 732. See also Colt *v.* Clapp, 127 Mass. 476. — Ed.]

§ 212. With a view to provide effectually against the abuse of professional confidence, even a purchase of an estate by an attorney

they are conducting. Such an agent has duties to discharge, of a fiduciary character toward his principal; and it is a rule of universal application, that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is or may be impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the *cestui que trust*, which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may even, at the time, have been better. But still so inflexible is the rule, that no inquiry on that subject is permitted. The English authorities on this subject are numerous and uniform.'

"The same subject has had a full and careful discussion and examination in the Supreme Court of the United States, in the case of Michoud *v.* Girod, 4 How. 554. The opinion of the court, by Mr. Justice Wayne, is distinguished for its clear analysis and elaborate review of all the cases bearing on the point. He says: 'The rule, as expressed, embraces every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the persons with whom he is dealing, or on whose account he is acting, and his own individual interest.' The same rule obtains in the civil law, with some modifications not necessary to notice.

"The language of Pothier is distinct and unequivocal: 'Nous ne pouvons acheter, ni par nous-mêmes, ni par personnes interposées, les choses qui font partie des biens dont nous avons l'administration.' (Tr. du Contrat de Vente, part 1, p. 13.) The rule of the civil law, without qualification, is adopted in Holland: 'Quæ vero de tutoribus cauta, ea quoque in curatoribus pro curatoribus, testamentorum, executoribus, aliis similibus, qui aliena gerunt negotia probanda sunt.' In Spain the rule is enforced without relaxation, and with stern uniformity. Judge Wayne, in the case of Michoud, in his opinion, cited the rule from the Novissima Recopilacion, in these words: 'No man who is testamentary executor, a guardian of minors, nor any other man or woman, can purchase the property which they administer, and whether they purchase publicly or privately, the act is invalid, and on proof being made of the fact, the sale must be set aside.' It is thus seen that the rule by which agents or trustees are prohibited and rendered incapable of purchasing or dealing with the property of their *cestui que trust*, is one of universal application, justified by a current of strong and high authorities, and is adhered to with stern and inflexible integrity; and the consequence of such dealing and purchasing is, that the agent or trustee is liable at any time, on the application of the *cestui qui trust*, and as a matter of course, and without reference to the fairness or unfairness of the transaction, the adequacy or inadequacy of the price paid, or any other equities of the agent or trustee, to have the sale set aside; such has been the uniform administration of the law in England, and where the civil law prevails, and in this country. No reason is suggested why rules thus founded on the soundest morals, which have been maintained with such uniformity

from his client is treated with severe jealousy by courts of equity. The presumption is *primâ facie* so far against its validity, that the burden of proof is thrown on the attorney, to establish its

and steadiness, should now be relaxed. On the contrary, it is seen that every consideration arising from circumstances surrounding us, and the unparalleled multiplicity of corporations, who can only act by trustees or agents, and the very large proportion of the wealth of the country invested in them, and placed under the control and management of agents and trustees, forcibly demands of courts of justice a firm adherence to these principles, and a stern application of them to every case coming within the sphere of their action.

"Nay, the rule, as applicable to managers of corporations, should in no particular be relaxed. Those who assume the position of directors and trustees, assume also the obligations which the law imposes on such a relation. The stockholders confide to their integrity, to their faithfulness, and to their watchfulness, the protection of their interests. This duty they have assumed, this the law imposes on them, and this those for whom they act have a right to expect. The principals are not present to watch over their own interests; they cannot speak in their own behalf; they must trust to the fidelity of their agents. If they discharge these important duties and trusts faithfully, the law interposes its shield for their protection and defence; if they depart from the line of their duty, and waste, or take themselves, instead of protecting, the property and interests confided to them, the law, on the application of those thus wronged or despoiled, promptly steps in to apply the corrective, and restores to the injured what has been lost by the unfaithfulness of the agent. This right of the *cestui que trust* to have the sale vacated and set aside, where his trustee is the purchaser, is not impaired or defeated by the circumstance that the trustee purchases for another. This point is fully discussed by Lord Eldon in *Ex parte* Bennett, 10 Vesey, 381. In this case he held, that as the solicitor to a commission of bankruptcy could not purchase at a sale of the bankrupt's effects, for the reasons above stated, so a sale made to a person who had requested the solicitor to employ another at the sale to bid for him, was set aside. He said: 'If the principle be that the solicitor cannot buy for his own benefit, I agree when he buys for another, the temptation to act wrong is less; yet if he could not use the information he has for his own benefit, it is too delicate to hold that the temptation to misuse that information for another person is so much weaker, that he should be at liberty to bid for another.' He adds: 'Upon the general rule, both the solicitor and commissioner have duties imposed on them that prevent their buying for themselves; and if that is the general rule, it follows of necessity that neither of them can be permitted to buy for a third person, for the court can with as little effect, examine whether that was done by making an undue use of the information received in the course of their duty, in the one case as in the other. No court of justice could institute investigation as to that point effectually, in all cases, and therefore the safest rule is that a transaction which, under the circumstances, should not be permitted, shall not take effect upon the general principle, as, if ever permitted, the inquiry into the truth of the circumstances may fail in a great proportion of cases.' And the sale for this reason was set aside. This case is referred to with approbation by Chancellor Kent, in Davoue *v.* Fanning, *supra*. It follows, therefore, that if the defendant Sherman was incapacitated to purchase for himself, he was equally incapacitated to act for the defendant Dean,

entire good faith for an adequate and fair consideration.[1] In this respect, it is said to differ from the case of a pure agency in par-

or any other person, to make the purchase; and on the authority of this case, if Dean was the sole purchaser, the same would be set aside.

"There can be no question, I think, at the present time, that a director of a corporation is the agent or trustee of the stockholders, and as such has duties to discharge of a fiduciary nature, towards his principal, and is subject to the obligations and disabilities incidental to that relation." See also Robinson *v.* Smith, 3 Paige, 222; Angell & Ames on Corp. 258, 260; Percy *v.* Milladon, 3 La. 568; Hodges *v.* New England Screw Co. 1 R. I. 321; Verplanck *v.* Merc. Ins. Co. 1 Edw. Ch. 84; Redfield on Railways, 494; Benson *v.* Hawthorne, 6 Younge & Collyer, 326; The York & North Midland Railway Co. *v.* Hudson, 16 Beav. 485; Aberdeen Railway Co. *v.* Blaikie, 1 McQueen, 461; Whichcote *v.* Lawrence, 3 Ves. 740. — R.] [The later cases upon this subject are in entire accord with those cited in the preceding note. Thus, where the directors of an incorporated company have received from the promoters of the company any remuneration for their services either in the form of actual cash or of shares of stock in the new company to qualify them to become directors, they are held to be merely trustees for the stockholders, and are obliged to account to them. Hay's Case, L. R. 10 Ch. 593; McKay's Case, L. R. 2 Ch. D. 1; Pearson's Case, L. R. 5 Ch. D. 336; Madrid Bank *v.* Pelly, L. R. 7 Eq. 442; Phosphate Sewage Co. *v.* Hartmont, L. R. 5 Ch. D. 394; and where a contract was made with such promoters through directors qualified by such gift of shares of stock, the contract was held to be void, and the money paid was recovered from the promoters. New Sombrero Phosphate Co. *v.* Erlanger, L. R. 5 Ch. D. 73. And the rule has been held to be an inflexible one when applied to the case of directors of a joint-stock bank, that such agents cannot in the course of their agency and in the matter of their agency make any profit without the knowledge and consent of their principal. Parker *v.* McKenna, L. R. 10 Ch. 96. So, in a recent case in Massachusetts, where the directors of a ferry company purchased for the company a ferry-boat which belonged to another ferry company, of which they also were the directors and only stockholders, at a cost much in excess of its real value, and then divided the proceeds among themselves, it was held that the profits belonged to the ferry company and could be recovered from them personally. Parker *v.* Nickerson, 112 Mass. 195; Gardner *v.* Butler, 39 N. J. Eq. 702. The president of a corporation cannot even purchase a small debt due from a corporation and levy on its property to pay it, as it creates an antagonistic relation between himself and his principal. Brewster *v.* Stratman, 4 Mo. App. 41. So, where a director transferred his shares to escape liability, and the other directors did not object, and even postponed the time of a call to allow him to do it, it was held that his duty as a director and trustee forbade such action. Gilbert's Case, L. R. 5 Ch. 559. And directors are responsible for the misapplication of the funds of a company, which misapplication could not have occurred if they had attended to their duties, although they themselves received no profit. Land Credit Co., *v.* Fermoy, L. R. 5 Ch. 763; Panama Case, L. R. 10 Ch. 515. But where a

[1] 1 Story, Equity Jurisp. §§ 310–316; Cane *v.* Allen, 2 Dow, 289, 299; [Pollon *v.* Martin, 1 Sandf. Ch. 569; Howell *v.* Ransom, 11 Paige, 538; Evans *v.* Ellis, 5 Denio, 640].

ticular transactions, for in those transactions the purchase of the agent has no validity whatever, independent of the ratification of the principal; whereas, in the case of attorney and client, the purchase is valid, if it can be shown to have been made *uberrimâ fide*, and without any advantage, taken from professional confidence on one side, or pressing necessity on the other.[1]

railroad corporation gave one of its directors money to purchase a concession for the company, and he purchased it for the company from himself, he having previously purchased it, though the company was ignorant of the fact, and the company afterwards sold it to a third party, it was held that the company must either adopt or repudiate the transaction, and having sold it, they must be held to have adopted it, and could not recover from the director, Great Luxembourg R. R. Co. *v.* Magnay, 25 Beav. 586: so, also, a director can retain the profits made by him, before he became a director, on contracts, which he knew the company, when incorporated, would take, Albion Wire Co. *v.* Martin, L. R. 1 Ch. D. 580: but this decision is not wholly consistent with the case of Parker *v.* McKenna, L. R. 10 Ch. 96. Lord Chelmsford, in the case of Overend and Gurney Co. *v.* Gibb, L. R. 5 H. L. 480, has drawn a distinction between the liability of directors who are trustees and directors who are simply agents. In the latter capacity they are not liable for results due wholly to lack of judgment, as, for instance, for money advanced to a fellow-director who died insolvent. Turquand *v.* Marshall, L. R. 4 Ch. 376. — Ed.]

[1] [Mr. Evans, in his recent work on Principal and Agent, p. 290 (Amer. ed.), states this rule even more strongly than in the text: "No gift or gratuity to a legal adviser, beyond his fair professional demand, made during the time he continues to conduct or manage the affairs of donor, will, as a rule, be permitted to stand, more especially if such gift or gratuity arises immediately out of the subject then under the adviser's conduct or management, and the donor is at the time ignorant of the nature and value of the property so given." Welles *v.* Middleton, 1 Cox, 112; Wright *v.* Proud, 13 Ves. 136; Harris *v.* Tremenheere, 15 Ves. 34; Broun *v.* Kennedy, 33 Beav. 133; Tomson *v.* Judge, 3 Drewry, 306. And this is so even though the conveyance is confirmed by the client's will. Waters *v.* Thorn, 22 Beav. 547. And this principle has been carried so far that an attorney has not been allowed, even in good faith, to buy at a tax sale lands of his client, Wright *v.* Walker, 30 Ark. 44: or to oppose levy of execution upon land of a client claiming it to be his own, Kennedy *v.* Redwine, 59 Ga. 329: nor can he purchase at the sale of his client's land under a power-of-sale mortgage either for himself or for a third party, Dyer *v.* Shurtleff, 112 Mass. 165: nor can he sell an annuity to his client, Gibson *v.* Jeyes, 6 Ves. 266: and if he purchases property of his client at a public sale he holds it as his trustee, unless he can clearly prove that he was acting in an independent character, Austin *v.* Chambers, 6 Cl. & F. 1.

This rule has been, however, somewhat relaxed, and it has been lately held that an attorney can deal with his client as a stranger where circumstances are not such as to put him under the duty of advising the client. In such a case there must be, however, *uberrima fides*. Guest *v.* Smythe, L. R. 5 Ch. 551. And see Jenkins *v.* Einstein, 3 Biss. 128; Woodward *v.* Humpage, 3 Giff. 337; Jones *v.* Thomas, 2 Y. & C. 498; Cooke *v.* Lamotte, 15 Beav. 234; Hoghton *v.* Hoghton, 15 Beav. 278; 1 Story on Eq. Jurisp. §§ 310–313. — Ed.]

§ 213. The Roman law asserted principles in most respects equally comprehensive. Thus it is said in the pandects: "Tutor rem pupilli emere non potest. Idemque porrigendum est ad similia, id est, ad curatores, procuratores, et qui negotia aliena gerunt."[1] The same doctrine has been incorporated into the French law,[2] and into that of other nations deriving their jurisprudence from the Roman law.[3] In one respect, the Roman law seems to have stopped short of the principles of our equity jurisprudence; for, by our law (as we have seen) it is immaterial, whether the purchase or sale be by a single trustee, or agent, acting alone, or by him acting in connection with other joint trustees or agents; for in each case, the purchase or sale will be invalid.[4] But according to the pandects, although a tutor cannot, at the same time, be both buyer and seller; yet, if he has a co-tutor, who has also authority to buy or sell, he may become the buyer or seller, unless there is some fraud. "Item, ipse tutor et emptoris et venditoris officio fungi non potest. Sed enim, si contutorem habeat, cujus auctoritas sufficit, procul dubio emere potest. Sed si malâ fide emptio intercesserit, nullius erit momenti."[5] The Roman law seems to have proceeded upon the notion, that the vigilance of the co-tutor, or co-agent, would sufficiently protect the interests of the pupil, or principal; whereas, our law has proceeded upon the wiser policy of deeming both equally guardians of his interests.

§ 214. The doctrine which we have been considering, is capable of a great variety of applications. But in all the cases, it is founded upon the same beneficial and enlightened policy, the protection of the principal, and the advancement of his interests. Thus, for example, if an agent, authorized to buy, should buy of himself, and the bargain is advantageous to the principal (as has been already hinted), the latter has his election to ratify it, or not; if disadvantageous, he may affirm it, or repudiate it, at his pleasure.[6] On the other hand, if the agent makes any profits in the care of his agency by any concealed management, either in buying, or

[1] Dig. Lib. 18, tit. 1, l. 34, § 7; Dig. Lib. 26, tit. 8, l. 5, §§ 2, 3; Ante, §§ 10, 210.

[2] Pothier, Traité de Vente, n. 13.

[3] Ersk. Inst. B. 1, tit. 7, § 19; 1 Voet, ad Pand. Lib. 18, tit. 1, 9, p. 766.

[4] Ante, §§ 210, 211.

[5] Dig. Lib. 26, tit. 8, l. 5, § 2.

[6] Ante, §§ 192, 207, 210; [Francis v. Kerker, 85 Ill. 190].

selling, or in other transactions on account of his principal, the profits will belong exclusively to the latter.[1]

§ 215. Besides the duties and obligations, thus arising from the general relations of principal and agent, there are others, again, which may arise from an express contract, or from an implied contract. The former requires no explanation; the latter, ordinarily, arises from the usages of particular trades, or the habits and special dealings between the particular parties. The most important, in a practical view, to be here taken notice of, is the contract of guaranty by a factor, arising from the receipt of what is commonly called a *del credere* commission (the nature whereof has been already stated),[2] by which he, in effect, becomes liable, in the case of a sale of goods, to pay to his principal the amount of the purchase-money, if the buyer fails to pay it, when it becomes due. It has been sometimes suggested, that this contract makes the factor the primary debtor to his principal, on the sale. But this doctrine is unmaintainable, both upon principle and authority.[3] The true engagement of the factor, in such cases, is merely to pay the debt, if it is not punctually discharged by the buyer. In legal effect, he warrants or guaranties the debt; and thus he stands more in the character of a surety for the debt, than as a debtor. Hence it is well established, that he is not liable to pay the debt, until there has been a default by the buyer.[4] The receipt of acceptances from the buyer, although transmitted to the principal, will not discharge the agent; but, there must be an absolute payment in money; or some other mode of payment, authorized by the principal.[5] But, if the money is once received from the buyer, and the dealings between the parties require the agent to remit to his

[1] East India Co. *v.* Henchman, 1 Ves. jr. 289; Massey *v.* Davies, 2 Ves. jr. 317; Prevost *v.* Gratz, 1 Peters, Cir. 364; Ante, §§ 210, 211.

[2] Ante, §§ 33, 112; Post, §§ 234, 328; Smith on Merc. Law, 52 (2d ed.); Id. ch. 5, § 2, p. 98 (3d ed. 1843); Leverick *v.* Meigs, 1 Cowen, 645; 3 Chitty on Com. & Manuf. 220, 221.

[3] Ante, § 33; 2 Kent, Comm. Lect. 41, pp. 624, 625 (4th ed.); Thompson *v.* Perkins, 3 Mason, 232; Gall *v.* Comber, 7 Taunt. 558; Peele *v.* Northcote, 7 Taunt. 478; Morris *v.* Cleasby, 4 M. & Selw. 566, 574; Leverick *v.* Meigs, 1 Cowen, 645.

[4] Morris *v.* Cleasby, 4 M. & Selw. 574. [But see Lewis *v.* Brehme, 33 Md. 412, 429, where the position taken in the text is denied. Greentree *v.* Rosenstock, 61 N. Y. 583; Couturier *v.* Hastie, 16 Eng. Law & Eq. 562; 8 Exch. 40; Swan *v.* Nessmith, 7 Pick. 220; Wolff *v.* Koppell, 5 Hill, 458; 2 Denio, 368; Bradley *v.* Richardson, 23 Vt. 720.]

[5] Ante, § 98; Post, § 413; McKenzie *v.* Scott, 6 Bro. Parl. Cas. 280 (Tomlins's ed.); Muller *v.* Bohlens, 2 Wash. Cir. 378.

principal, he does not become a guarantor of the payment of such remittance; but he is deemed an ordinary factor, liable only for due diligence in purchasing the remittance.[1]

§ 216. Hitherto we have been chiefly considering the duties and obligations of agents to their principals. There are, however, certain duties and obligations, which they may incur in their dealings with third persons, for the breach of which they become personally responsible to the latter. But these will be more properly and conveniently discussed in some of the succeeding chapters, as they are of a more limited extent, and fall naturally within the topics embraced therein.[2]

§ 217. The duty of thus guarding the interests of the principal is not confined to cases where the agent may sacrifice his interests by attempts to further his own; but the same protective policy extends to cases where the interests of strangers are sought to be asserted by the agent, adversely to those of the principal. Therefore it is, that an agent is not, ordinarily, permitted to set up the adverse title of a third person, to defeat the rights of his principal, against his own manifest obligations to him; or to dispute the title of his principal.[3] If, therefore, he has received goods from his principal, and has agreed to hold them, subject to his order, or to sell them for him, and to account for the proceeds, he will not be allowed to set up the adverse title of a third person to the same goods, to defeat his obligations.[4] And if he should agree by a re-

[1] Leverick *v.* Meigs, 1 Cowen, 645. But see McKenzie *v.* Scott, 6 Bro. Parl. Cas. by Tomlins, 286; Lucas *v.* Groning, 7 Taunt. 164; Smith on Merc. Law, 52 (2d ed.); Id. ch. 5, § 2, p. 98 (3d ed. 1843).

[2] Post, ch. 10, §§ 260–301; ch. 12, §§ 308–322.

[3] Kieran *v.* Sandars, 6 Adolph. & Ellis, 515; Nicholson *v.* Knowles, 5 Madd. 47. [Thus, where an agent is placed in possession of real estate by the owner as tenant to hold possession of the property, he cannot affect the rights of his principal by attornment or by an agreement to attorn to a third party. McNamee *v.* Relf, 52 Miss. 426. And it has been held that the rule that an agent cannot dispute the title of his principal applies to wharfingers and warehousemen. Betteley *v.* Reed, 4 Q. B. 511. See Jefferies *v.* Great West. Railway Co., 5 E. & B. 802; Collins *v.* Tillon, 26 Conn. 368. So, a factor is bound to assume that his principal is the owner of goods consigned to him for sale, and his allegiance is alone due to his principal, and he cannot justify a refusal to pay over their proceeds on the ground that they have been taken on attachment against a third person, or paid over on execution in suit against such third person of which the principal had no notice. Barnard *v.* Kobbe, 54 N. Y. 516. — Ed.]

[4] Holl *v.* Griffin, 10 Bing. 246; Harman *v.* Anderson, 2 Camp. 243; Steward *v.* Duncan, 2 Camp. 344; Dickson *v.* Hamond, 2 B. & Ald. 310; Goslin *v.* Bir-

ceipt to hold them for such third person, such conduct would amount to a conversion of the property of his principal, for which an action would lie.[1] An exception, however, is allowed, where the principal has obtained the goods fraudulently, or tortiously, from such third person.[2] The same principle is upheld, as well in equity, as at law; and therefore, if an agent receives money for his principal, he is bound to pay it over to him, and he cannot be converted into a trustee for a third person, by a mere notice of his claim.[3]

§ 217 *a*. It is upon a somewhat analogous principle, connected with the want of privity, that an agent employed by a trustee is

nie, 7 Bing. 339; White *v*. Bartlett, 9 Bing. 378; Roberts *v*. Ogilby, 9 Price, 269; Hardman *v*. Wilcock, 9 Bing. 382, note; Kieran *v*. Sandars, 6 Adolph. & Ellis, 515; Hawes *v*. Watson, 2 B. & Cressw. 540; Story on Bailm. § 110; Smith's Compendium of Merc. Law, ch. 5, § 2, p. 94 (3d ed. 1843). [Where a remittance is sent to an agent for a particular purpose, whether by bill or money, the agent who receives it must either apply it for the purpose designated or return it. Vaughan *v*. Halliday, L. R. 9 Ch. 561. So, where a principal remits money to his agent to be paid to a designated person under a binding contract, the principal's assignees in bankruptcy cannot recover it from the agent. Yates *v*. Hoppe, 9 C. B. 541. See Branch *v*. Du Bose, 55 Ga. 21. Nor is an agent chargeable, as trustee of his principal under process of attachment where he holds a check payable to his order and given in payment for a vessel belonging to several joint owners, his principal being one of the owners, and which he agrees not to use for a certain time. Knight *v*. Bowley, 117 Mass. 551. See Hancock *v*. Gomez, 58 Barb. 490. — Ed.]

[1] Holbrook *v*. Wight, 24 Wend. 169. [See Witman *v*. Felton, 28 Mo. 602.]

[2] Hardman *v*. Wilcock, 9 Bing. 382, note; Taylor *v*. Plumer, 3 M. & Selw. 562. We are carefully to distinguish those cases, where the suit is brought by the principal, from those, where the suit is brought by a third person, claiming the property against the agent. The rights of the latter to maintain the suit are not affected by any thing that has passed between the principal and agent. If such third person has a good title to the goods, he may recover them, notwithstanding the bailment. See Ogle *v*. Atkinson, 5 Taunt. 759; Wilson *v*. Anderton, 1 B. & Adolph. 450; Story on Bailm. §§ 102, 103. There is a *dictum* in Ogle *v*. Atkinson, by Lord Chief Justice Gibbs, which contradicts the text, in which he refers to a point made, that the defendants (the agents) cannot refuse to deliver up the goods to the plaintiff (the principal), from whom they received them; and he then says: "But, if the property is in others, I think that they may set up this defence." This *dictum* has been since treated as untenable. See Goslin *v*. Birnie, 7 Bing. 339. [And the bailee of spurious goods, who has been requested by the persons injured not to part with them, as an injunction was going to be applied for, is justified in refusing to deliver them to his principal, although he has not received actual notice of an injunction, a reasonable time to obtain it not having elapsed. Hunt *v*. Manière, 34 Beav. 157.]

[3] Nicholson *v*. Knowles, 5 Madd. 47; Story on Bailm. §§ 102, 103; 2 Story, Eq. Jurisp. § 317; [Hancock *v*. Gomez, 58 Barb. (N. Y.) 490].

accountable only to him, and not to the *cestui que trust*;[1] and a sub-agent ordinarily is accountable only to the *superior* agent, who has employed him, and not, generally, to the principal.[2] But where, by the usage of trade, or otherwise, a sub-agent is employed, with the express or implied consent of the principal, there the original agent will not be responsible for the conduct of the sub-agent; but the appropriate remedy of the principal for the misconduct or negligence of the sub-agent is directly against the latter,[3] since a privity will, under such circumstances, exist between them. In many cases of this sort, however, the agent may by his own conduct render himself responsible to his principal for the acts of the sub-agent, and for money received by him on account of his princi-

[1] Myler *v.* Fitzpatrick, 6 Madd. 360; Ante, § 201. [So held where the principal was trustee of a charity and managed all the affairs and business of the charity through an agent who collected the funds and disbursed them. Atty.-Genl. *v.* Earl of Chesterfield, 18 Beav. 596. Nor is the agent of a factor liable to a third person for failing to transmit his orders to the agent's principal with regard to the sale of cotton consigned by him to the factor. Reid *v.* Humber, 49 Ga. 207. Nor is a wife employed as agent by her husband accountable to her husband's principal. Le Texier *v.* Margravine of Anspach, 5 Ves. 322. — Ed.]

[2] Cartwright *v.* Hately, 1 Ves. jr. 292; Pinto *v.* Santos, 5 Taunt. 447; Stephens *v.* Badcock, 3 B. & Adolph. 354; Ante, §§ 13–15, note; Tickel *v.* Short, 2 Ves. 239; *Ex parte* Sutton, 2 Cox, 84; Soley *v.* Rathbone, 2 M. & Selw. 298; Cockran *v.* Irlam, 2 M. & Selw. 301, 303, note; Myler *v.* Fitzpatrick, 6 Madd. 360; Ante, § 201; Post, §§ 321, 322; [Jackson Ins. Co. *v.* Partee, 9 Heisk. 296].

[3] Goswill *v.* Dunkley, 1 Str. 680. See Branby *v.* Coxwell, 2 Bos. & Pull. 438; Cockran *v.* Irlam, 2 M. & Selw. 301, note, 303; Merrick *v.* Barnard, 1 Wash. Cir. 479; Ante, §§ 14, 15, 201; Foster *v.* Preston, 8 Cowen, 198. In Cockran *v.* Irlam, 2 M. & Selw. 303, note, Lord Ellenborough said: "A principal employs a broker from the opinion he entertains of his personal skill and integrity; and a broker has no right, without notice, to turn his principal over to another of whom he knows nothing. It appears to me, therefore, that there is no privity, either expressed or implied, between Campbell and Orr, and Hutchinson. There certainly was not any express privity; neither can any be implied, unless the case had found, that the usage of trade was such as to authorize one broker to put the goods of his employer into the hands of a sub-broker to sell, and to divide the commission with him. It is said, however, that Campbell and Orr drew bills on their broker for these goods, and that afterwards they received value for them; but the case fails in establishing that point." See also Post, §§ 308, 313, 322, 453 *a*, 453 *b*, 453 *c*, 454 *a*. [Thus, a general or supervising agent was held not to be responsible for acts of negligence of his sub-agent, where such sub-agent was a cashier appointed by the sanction of the principal, or by the principal upon his recommendation, and where the general agent used reasonable diligence in his selection of such sub-agent. Louisville, &c. R. R. Co. *v.* Blair, 1 Tenn. Ch. 351. — Ed.]

pal;[1] as, for example, if he has participated or co-operated with the sub-agent in his improper acts, or misconduct, or deviation from duty.

[1] Taber *v.* Perrott, 2 Gall. 565; Ante, § 201; Post, §§ 231 *a*, 313, 322. [Where a bank in Illinois sent a draft to a bank in North Carolina to collect, and the latter sent it to another bank nearer the residence of the drawer, and the last-named bank having collected the draft, failed, it was held that the North Carolina Bank was liable to the Illinois bank for the amount of the draft. Kent *v.* Dawson Bank, 13 Blatchf. C. C. 267. So, where an agent to sell machines appointed P. his agent, who employed B. to assist him, and B. sold a machine on credit to an insolvent party, the loss on which was more than his commissions on his other sales, it was held that P. was answerable to the chief agent, and B. was liable to P. Pownall *v.* Bair, 78 Pa. St. 403; Laverty *v.* Snethen, 68 N. Y. 522 — Ed.]

CHAPTER VIII.

LIABILITIES OF AGENTS TO THEIR PRINCIPALS.

§ 217 *b.* HAVING thus considered the nature and extent of the duties and obligations of agents, we are, in the next place, led to the consideration of the correlative topic of the liabilities of agents. These are naturally divisible into two general heads: (1.) Their liabilities to their principals;[1] and (2.) Their liabilities to third persons.

[1] [*Liability of Attorney for Negligence.* — An attorney is liable to his principal for negligence both in this country and in England. "He is liable for the consequences of ignorance for non-observance of the rules of practice of the courts, for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession; whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction." Tindal, C. J., in Godefroy *v.* Dalton, 6 Bing. 460. If he undertakes the collection of a debt, and by his negligence puts it in such a situation as to embarrass the creditor in obtaining payment, and to render the debt less valuable, he is liable to his client. Wilson *v.* Coffin, 2 Cush. 316. He is not responsible for the absence, neglect, or want of attention of the counsel engaged in the cause. Lowry *v.* Guilford, 5 C. & P. 234. He has been held responsible for losing a deed belonging to his client, Reeve *v.* Palmer, 5 C. B. N. S. 84: for mislaying his client's papers, Wilmot *v.* Elkington, 1 N. & M. 749: for the damages suffered by a party against whom a judgment has been recovered upon his unauthorized appearance in his behalf, Everett *v.* Warner Bank, 15 Am. Law Rev. 149: and for allowing his client to execute an unusual covenant without informing him of the consequences, Stannard *v.* Ullithorne, 10 Bing. 491. Where money was paid by a client to one member of a firm of solicitors for investment, and he absconded with the money, the other members of the firm were held responsible. Dundonald *v.* Masterman, L. R. 7 Eq. 504; St. Aubyn *v.* Smart, L. R. 3 Ch. 646; Plumer *v.* Gregory, L. R. 18 Eq. 621. An attorney is not liable, however, for negligence in performing a gratuitous service, Fish *v.* Kelly, 17 C. B. N. S. 194: nor for an erroneous certificate that the title to a lot of land was good, by which the plaintiff, who had not employed him nor paid him, was misled, Nat. Savings' Bank *v.* Ward, 14 Am. Law Rev. 245: nor for failing to note upon an abstract of title to certain lands, which he was employed to make from and after a specified date, an unsatisfied judgment, which appears of record prior to that date, though it becomes a lien after that time, Wakefield *v.* Chowan, 14 Am.

§ 217 *c*. And first, their liabilities to their principals. From what has been already said it is sufficiently clear, that wherever an agent violates his duties or obligations to his principal, whether it be by exceeding his authority or by positive misconduct, or by mere negligence or omission in the proper functions of his agency, or in any other manner, and any loss or damage thereby falls on his principal, he is responsible therefor, and bound to make a full indemnity.[1] In such cases, it is wholly immaterial whether the loss or damage be direct to the property of the principal, or whether it arise from the compensation or reparation, which he has been obliged to make to third persons in discharge of his liability to

Law Rev. 329. See also Cummins *v.* Heald, 24 Kansas, 600; Rice *v.* Melendy, 41 Ia. 395. Samuel Davies, *In re*, 14 Am. Law Rev. 462; Stevenson *v.* Rowand, 2 Dow & C. 104; Lamphier *v.* Phipos, 8 C. & P. 475; Purves *v.* Landell, 12 Cl. & F. 91 ; Hart *v.* Frame, 6 Cl. & F. 193; Mercer *v.* King, 1 F. & F. 490 ; Parker *v.* Rolls, 14 C. B. 691, and cases there cited by counsel; Lewis *v.* Collard, 14 C. B. 208; Kemp *v.* Burt, 4 B. & Ad. 424; Shilcock *v.* Passman, 7 C. & P. 289; Crosbie *v.* Murphy, 8 Ir. C. L. R. 301; Williams *v.* Gibbs, 6 N. & M. 788; Cox *v.* Leech, 1 C. B. N. S. 617; Lee *v.* Dixon, 3 F. & F. 744; Hunter *v.* Caldwell, 10 Q. B. 69; Godefroy *v.* Jay, 7 Bing. 413; Watson *v.* Muirhead, 57 Penn. St. 161; A. B.'s Estate, 1 Tucker (N. Y.), 247; Harter *v.* Morris, 18 Ohio St., 492; Walpole *v.* Carlisle, 32 Ind. 415; Stevens *v.* Walker, 55 Ill. 151; Arnold *v.* Robertson, 3 Daly (N. Y.), 298; Pidgeon *v.* Williams, 21 Gratt. (Va.) 251.

Solicitors' Liability. — By the English law counsel are not responsible to their clients for negligence. Purves *v.* Landell, 12 Cl. & F. 91 ; Baikie *v.* Chandless, 3 Camp. 17; Pitt *v.* Holden, 4 Burr. 2060. — Ed.]

[1] Marzetti *v.* Williams, 1 B. & Ad. 415; Dodge *v.* Tileston, 12 Pick. 328 ; Savage *v.* Birckhead, 20 Pick. 167 ; [Attorney-General *v.* Corporation of Leicester, 7 Beav. 176; Wilson *v.* Short, 6 Hare, 366; Grant *v.* Ludlow, 8 Ohio St. 1. Thus, where an agent to loan money negligently takes insufficient security, Bank of Owensboro' *v.* Western Bank, 13 Bush (Ky.), 526 ; Shipherd *v.* Field, 70 Ill. 438 ; Nicolai *v.* Lyon, 8 Oreg. 56 : or negligently violates his principal's instructions in making a sale of his principal's property, Howe *v.* Sutherland, 39 Iowa, 484; Hungerford *v.* Scott, 37 Wisc. 341 ; Scoby *v.* Branch, 59 Tenn. 66 : or makes negligent investments of his principal's moneys in Confederate bonds or other worthless securities, Maloney *v.* Stephens, 11 Heisk. 738 ; Williams *v.* Williams, 11 Heisk. 95 ; Sioux City, &c. R. R. Co. *v.* Walker, 49 Iowa, 273; Heineman *v.* Heard, 62 N. Y. 448: or disobeys his principal's instructions without a necessity therefor, Bunger *v.* Roddy, 70 Ind. 26; Wilts *v.* Morrell, 66 Barb. 511: he is responsible to his principal in each case for the damages suffered by the latter, unless, upon deviating from his instructions, he informs his principal at once of such deviation and the principal ratifies the agent's acts, Bray *v.* Gunn, 53 Ga. 144. But where a party deposited some bonds with a bank for safe keeping, but without paying the bank for their keeping, and the cashier of the bank stole them, it was held that the bank, being gratuitous bailees, were not guilty of negligence, and were not liable. Giblin *v.* McMullen, L. R. 2 P. C. 317. And see Antram *v.* Thorndell, 74 Pa. St. 442; Todd *v.* Bourke, 27 La. Ann. 385. — Ed.]

them, for the acts or omissions of his agent.[1] The loss or damage need not be directly or immediately caused by the act which is done, or is omitted to be done. It will be sufficient if it be fairly attributable to it, as a natural result, or a just consequence.[2] But it will not be sufficient if it be merely a remote consequence, or an accidental mischief; for in such a case, as in many others, the maxim applies, "Causa proxima, non remota, spectatur."[3] It must be a real loss, or actual damage, and not merely a probable or possible one.[4] Where the breach of duty is clear, it will, in the absence of all evidence of other damage, be presumed that the party has sustained a nominal damage.[5]

§ 218. We may illustrate these remarks by some of the cases already cited in the foregoing pages. And first, in relation to the point that the loss or damage need not be directly or immediately caused by the act or omission of the agent. Thus, if an agent should knowingly deposit goods in an improper place, and a fire should accidentally take place, by which they are destroyed, he will be responsible for the loss:[6] for, although the loss is not the immediate and direct consequence of the negligence, but of the fire; yet it may be truly said, that it would not have occurred, except from such negligence. The negligence, then, was the occasion, although not strictly the cause, of the loss; and the loss may be fairly attributed to it.[7] So, if an agent should so negligently execute his duty in procuring a policy of insurance, as that the risk

[1] Ante, §§ 200, 201; Arrott *v.* Brown, 6 Whart. 9; Harvey *v.* Turner, 4 Rawle, 223; Woodward *v.* Suydam, 11 Ohio (Stanton), 363; Pothier on Oblig. by Evans, note 453. In Louisiana, the civil code restricts the liability of principals, for the delinquency and acts of their agents, in the functions in which they have employed them, to cases where the principal might have prevented the act which caused the damage, and has not done it. Code Civil of Louisiana, art. 2299; Strawbridge *v.* Turner, 8 Miller (La.), 537. This is different, however, from the civil law, which creates a general liability for all the delinquencies and acts of agents, in matters within their authority. Pothier on Oblig. by Evans, note, 453.

[2] Caffrey *v.* Darby, 6 Ves. 490; Jeffrey *v.* Bigelow, 13 Wend. 518.

[3] Story on Bailm. §§ 515–524; Smith *v.* Condry, 1 Howard, Sup. Ct. 28; s. c. 17 Peters, 20; Vicars *v.* Wilcocks, 8 East, 1; 2 Smith's Leading Cases, 300, and note (2d ed.); 1 Smith's Leading Cases, 132, note (2d ed.).

[4] Ante, § 200, and note, § 217; Post, § 221; Webster *v.* De Tastet, 7 T. R. 157; Bell *v.* Cunningham, 3 Peters, 69, 85. See Harvey *v.* Turner, 4 Rawle, 223; Arrott *v.* Brown, 6 Whart. 9.

[5] Marzetti *v.* Williams, 1 B. & Ad. 415.

[6] Ante, § 200, and note.

[7] Ante, § 200.

(as, for example, a peril of the seas, by which a loss was caused) should not be included in it; the principal might, nevertheless, recover the amount of the loss against the agent, although the loss was directly caused by the peril of the seas.[1] So, if an agent, who is bound to procure insurance for his principal, neglects to procure any, and a loss occurs to his principal from a peril ordinarily insured against, the agent will be bound to pay the principal the full amount of the loss occasioned by his negligence.[2] So, if an agent to procure insurance should procure the policy to be underwritten by insurers notoriously in bad credit, or insolvent, and a loss should occur therefrom, he would be bound to indemnify his employer against the loss.[3] So, if an agent should improperly deposit the money of his principal in his own name in the hands of a banker, who should afterwards become insolvent, the loss must be ultimately borne by the agent.[4] So, if a carrier-master of a ship should unnecessarily deviate from the proper course of the voyage, and the goods shipped should afterwards be injured by a tempest, or should be lost by capture, or other peril, the shipper would be entitled to a full indemnity from the shipmaster and ship-owner.[5]

§ 219. In all these cases, although the misconduct or negligence of the agent is not the direct and immediate cause of the loss; yet it is held to be sufficiently proximate, to entitle the principal to recover for the loss or damage; for, otherwise, the principal would ordinarily be without remedy for such loss or damage; since the same objection would apply in almost all cases of this sort. It is true, that, in many cases of this sort, it may be said that it is not certain that the loss or damage might not have occurred, if there

[1] Mallough *v.* Barber, 4 Camp. 150; Park *v.* Hammond, 4 Camp. 344; s. c. 6 Taunt. 495; 1 Phillips on Ins. ch. 22, pp. 519–524; Marsh. on Ins. B. 1, ch. 8, § 2, pp. 297–301; Ante, § 191.

[2] Wallace *v.* Telfair, 2 T. R. 188, note; Smith *v.* Lascelles, 2 T. R. 187; Delancy *v.* Stoddart, 1 T. R. 24; Morris *v.* Summerl, 2 Wash. Cir. 203; De Tastett *v.* Crousillat, 2 Wash. Cir. 132, 136; Ante, §§ 190, 191, 200; [Gettins *v.* Scudder, 71 Ill. 86].

[3] 2 Valin, Comm. Lib. 3, tit. 6, art. 3, p. 33; Ante, §§ 187, 191.

[4] Caffrey *v.* Darby, 6 Ves. 496; Wren *v.* Kirton, 11 Ves. 382; Ante, §§ 200, 208. [And an agent who deposits his principal's money in his own name in a bank without authority express or implied to do so, converts such money to his own use and takes all the risks attending such deposit. Sargeant *v.* Downey, 49 Wisc. 524. See People *v.* Green, 23 Hun, 280. — Ed.]

[5] Davis *v.* Garrett, 6 Bing. 716; Parker *v.* James, 4 Camp. 112; Dale *v.* Hall, 1 Wils. 281; Max *v.* Roberts, 12 East, 89; Story on Bailm. §§ 413, 509.

had been no such misconduct or negligence; but this furnishes no objection to the recovery. Thus, if an agent has improperly sold goods on a credit, to a person not in good credit, it may be said, that he might have sold the goods to another person, apparently in good credit, who might have failed before the expiration of the credit.[1] So, in the above case of a loss by tempest, or capture, or other peril after a deviation, it may be said, that the like loss might have occurred, if the vessel had continued on the voyage. But the law disregards such subtleties and niceties, as to causes and possibilities, and it acts upon the intelligible ground, that, where there has been misconduct or negligence in the agent, all losses and damages occurring afterwards, to which the property would not have been exposed, but for such misconduct or negligence, are fairly attributable to it, as a sufficiently proximate cause, although not necessarily the immediate or nearest cause of the loss or damage. The doctrine, too, may be vindicated upon the broader ground of public policy, that no wrong-doer ought to be allowed to apportion or qualify his own wrong; and that, as a loss has actually happened, whilst his wrongful act was in operation and force, which is fairly attributable to his wrongful act, he ought not to be permitted to set up, as a defence, that there was a more immediate cause of the loss, acting upon the subject-matter at the same time, or a bare possibility of loss, if his wrongful act had not been done.[2]

§ 220. In the next place, as to the point of the loss or damage being merely a remote consequence, or accidental mischief, from the negligence or omission of the agent. Thus, if an agent, who is bound to render an account, and to pay over moneys to his principal, at a particular time, should omit so to do, whereby the principal should be unable to pay his debts, or to fulfil his other contracts, and should stop payment and fail in business, or be injured

[1] See Ante, § 202. [So, where an agent was authorized to sell on condition that payment was secured by paper "unquestionably good," and the purchasers were notoriously insolvent and their notes not collectible, it was held that the agent was liable in damages for his disobedience of orders. Robinson Machine Works *v.* Vorse, 52 Iowa, 207. And in a similar case he was held to have made himself a guarantor of the notes and must see that they are paid. Clark *v.* Roberts, 26 Mich. 506. So, where the agent was ordered to sell only for cash and he sold on credit, he was held responsible for the value of the goods and expenses incurred in the matter by his principal. Stearine, &c. Co. *v.* Heintzmann, 17 C. B. N. S. 56. See Bannon *v.* Warfield, 42 Md. 22. — Ed.]

[2] Davis *v.* Garrett, 6 Bing. 716; Caffrey *v.* Darby, 6 Ves. 496.

in his general credit thereby, the agent would not be liable for such injury; for it is but a remote or accidental consequence of the negligence.[1] So, if an agent having funds in his hands, should improperly neglect to ship goods by a particular ship, according to the orders of his principal; and the ship should duly arrive; and, if the goods had been on board, the principal might, by future reshipments and speculations, have made great profits thereon; the agent will not be bound to pay for the loss of such possible profits; for it is a mere contingent damage, or an accidental mischief.[2] So, if an agent, bound to make a shipment to his principal from a foreign port, not being limited to any particular ship, should wholly neglect so to do; and it should appear, that, if the shipment had been made, and had safely arrived in due season, the principal would have made great profits; the agent would not be liable for such loss of profits; for, as it could not, under such circumstances, be absolutely ascertained, whether the shipment would have arrived at the port, or in what ship, or at what particular time, the loss or damage would be merely contingent and possible.[3] The same reasoning would apply to a case, where, by the neglect of an agent to remit money, the principal has been prevented from engaging in a profitable speculation in some other business by his want of funds.

§ 221. In all cases of this sort, the law contents itself with rules as to dámages derived from sources having more certainty and universality of application; and founded upon the ordinary results of human transactions. Thus, if an agent improperly withholds the money of his principal, he is made liable for the ordinary interest of the country where it ought to be paid, and the incidental expense of remitting it, if it ought to be remitted.[4] So, if

[1] Short *v.* Skipwith, 1 Brock. Cir. 103, 104. See Arrott *v.* Brown, 6 Whart. 9; [Western R. R. Co. *v.* Bayne, 75 N. Y.; Reed *v.* Dongan, 54 Ind. 306].

[2] Bell *v.* Cunningham, 3 Peters, 69, 84, 85; s. c. 5 Mason, 161; Ante, § 217; Post, § 221.

[3] See The Amiable Nancy, 3 Wheat. 560, 561; Ante, § 217; Post, § 221; Smith *v.* Condry, 1 Howard, Sup. Ct. 28; s. c. 17 Peters, 20.

[4] Short *v.* Skipwith, 1 Brock. Cir. 103, 104. [So, an agent entrusted with goods which he is to sell for his principal, and to account for the proceeds, is guilty of a conversion of the property if he wrongfully refuses to sell or to account when directed, and unlawfully retains possession of the goods against the wishes of his principal. Coleman *v.* Pearce, 26 Minn. 123; Tate *v.* Laforest, 25 La. Ann. 187. Campbell *v.* State, 35 Ohio St. 70. And in such case the measure of liability is the market value of the property at the time of the re-

the goods of the principal are negligently lost, or tortiously disposed of, by the agent, he is made liable for the actual value of the goods at the time of the loss or the conversion.[1] So in the case, above supposed, of a non-shipment of goods by an agent, where the ship by which they were ordered to be sent has safely arrived, the principal would be entitled to recover the actual value of the goods at the port of arrival; for, as the ship has safely arrived, that is the actual loss sustained by the principal by the non-shipment, although that value may be greatly enhanced by the state of the market, beyond what the prime cost would have been at the port where the shipment ought to have been made.[2] So, if an agent is directed to invest the funds of his principal in a particular stock, and he neglects so to do, and the stock thereupon rises, the principal is entitled to recover the enhanced value, as if the stock had been purchased.[3] But possible or probable future profits, or contingent and speculative gains, would constitute no just ingredients in the estimate of such loss or damage from the uncertainty of their nature, the fluctuating and changeable elements on which they depend, and their utter inadequacy and unfitness, as a rule, in a great variety of cases where a wrong has been done to the principal.[4]

§ 222. In the next place, there must be a real loss, or actual

ceipt of the order to sell. Whelan *v.* Lynch, 60 N. Y. 469; Scott *v.* Rogers, 4 Abb. Ap. Cas. 157. — Ed.]

[1] The Amiable Nancy, 3 Wheat. 560, 561; Pope *v.* Barrett, 1 Mason, 117; Woodward *v.* Suydam, 11 Ohio (Stanton), 363. [But where the agent wrongfully raises money on goods entrusted to him for sale, the principal may abandon the goods if he prefers, and treat the money so raised as money had and received by the agent to his use. Keating *v.* Marsh, 1 Mont. & Ayr. 582, 592; Bonzi *v.* Stewart, 5 Scott, N. R. 1; McVeigh *v.* Bank of Old Dominion, 26 Gratt. 188. — Ed.]

[2] Cunningham *v.* Bell, 3 Peters, 84, 85; Ante, § 220.

[3] Short *v.* Skipwith, 1 Brock. Cir. 103; [Webster *v.* Whitworth, 49 Ala. 201; Baker *v.* Drake, 66 N. Y. 518].

[4] Bell *v.* Cunningham, 3 Peters, 69, 84, 85; s. c. 5 Mason, 161; The Amiable Nancy, 3 Wheat. 560, 561; Tide-Water Canal Co. *v.* Archie, 9 Gill & John. 479, 535; Smith *v.* Condry, 1 Howard, Sup. Ct. 28; s. c. 17 Peters, 20; Ante, § 220. ["But where the damages sought to be recovered are not those which, in the ordinary course of affairs, would naturally arise, but are of an exceptional nature, arising from special and peculiar circumstances, it is clear that in the absence of any notice to the defendant of any such circumstances, such damages cannot be recovered." Blackburn, J., in Horne *v.* Midland R. Co., L. R. 8 C. P. 140; Cory *v.* Thames Ironworks Co., L. R. 3 Q. B. 181; British Col. Saw Mill Co. *v.* Nettleship, L. R. 3 C. P. 499; Gee *v.* Lancashire, &c. R. Co., 6 H. & N. 211; Hadley *v.* Baxendale, 9 Ex. 341. — Ed.]

damage, and not merely a probable or a possible one. Therefore, if an agent is ordered to procure a policy of insurance for his principal, and neglects to do it; and yet the policy, if procured, would not have entitled the principal, in the events which happened, to recover the loss or damage, the agent may avail himself of that, as a complete matter of defence.[1] Thus, if the ship to be insured has deviated from the voyage; or the voyage or the insurance is illegal; or the principal had no insurable interest; or the voyage, as described in the order, would not have covered the risk, — in all such cases, the agent, although he has not fulfilled his orders, will not be responsible; for the principal cannot have sustained any real loss or actual injury by the neglect.[2] And, in such cases, it will make no difference, that if the insurance had been made, the underwriters might probably have paid the loss or damage without objection; for the right to recover is still an essential ingredient in the case against the agent.[3] So, if the principal would have sustained a loss or damage, if his orders had been complied with, that would be an answer to a suit for the breach of them; for there must not only be a wrong done, but a damage resulting therefrom.[4] However, as has been already stated, it will be presumed, unless the contrary clearly appears, that the principal, by the breach of his orders, has sustained some damages; and, if none other are established in evidence, he will be entitled to nominal damages.[5]

§ 223. It will be no excuse for an agent who has rendered himself responsible by his negligence, or his deviation from orders, that he has, in other transactions, conducted himself so well, that his principal has derived greater advantages therein from his uncommon care, skill, and diligence. For it is his duty in all cases, to manage the business of his principal to the best advantage, and to his best ability. In this respect, as has been very properly said, the case of an agent does not differ from that of a partner under the Roman law, who was not permitted to set off the

[1] Marsh. on Ins. B. 1, ch. 8, § 2, pp. 297–305; 1 Phillips on Ins. ch. 22, pp. 519–524; 2 Phillips on Ins. ch. 22, p. 363; Post, §§ 235, 238.

[2] Post, §§ 235, 238; Marsh. on Ins. B. 1, ch. 8, § 2, p. 300; Delaney *v.* Stoddart, 1 T. R. 22; Webster *v.* De Tastet, 7 T. R. 157.

[3] Webster *v.* De Tastet, 7 T. R. 157; Formin *v.* Oswell, 3 Camp. 359. See De Tastett *v.* Crousillat, 2 Wash. Cir. 132.

[4] Post, § 236.

[5] Ante, § 217; Marzetti *v.* Williams, 1 B. & Ad. 415.

profits which the partnership had derived from his superior skill, attention, and diligence in one instance, against losses sustained by his negligence in other instances. "Non ob eam rem minus ad periculum socii pertinet, quod negligentia ejus periisset, quod in plerisque aliis industria ejus societas aucta fuisset. Et hoc ex appellatione Imperator pronunciavit." [1]

§ 224. And not only will an action lie against an agent for losses and damages occasioned by any violation or neglect of his duty; but, in many cases, where it touches the property of the principal, the latter will be entitled to proceed *in rem*, and reassert his rights thereto; a remedy which may sometimes be the only effectual means (as, for example, in case of the insolvency of the agent) to secure to the principal an adequate redress.[2] When, therefore, the property of the principal is intrusted to the agent for a special purpose, — as, for example, for sale or exchange, if a transfer is made by him within the scope of the authority confided to him, a good title will be conveyed to the transferee. But when the transfer is made in a mode which is not within the scope of the authority confided to the agent, or with which the agent is not apparently clothed, or held out to the public to be clothed, no title to the property will be passed, and it may be reclaimed by the owner.[3] We have already seen, that, in the case of a general agent, his acts are valid to bind the principal within the scope of the general authority, with which his agency apparently invests

[1] Dig. Lib. 17, tit. 2, l. 25; s. p. Dig. Lib. 17, tit. 2, l. 26; [James *v.* Borgeois, 4 Bax. (Tenn.) 345].

[2] The particular remedies, which are to be pursued, either *in personam*, or *in rem*, are more proper for a treatise on pleading, than for one, like the present, which seeks only to expound the general rights and duties incident to agency.

[3] 3 Chitty on Com. & Manuf. 204; Boyson *v.* Coles, 6 M. & Selw. 14. [Thus, an agent empowered to sell land has no power to exchange the same, and any one dealing with him must take notice of his real authority, and a deed made by him to carry out an exchange was held to be void. Lumpkin *v.* Wilson, 5 Heisk. 555. So, where an agent was authorized to sell land at a certain fixed price, and three years afterwards, when the value of the land has greatly advanced, he sells it at the same price at a great sacrifice, without informing his principal of the rise in value, it was held that the principal was not bound to make a conveyance of the land. Proudfoot *v.* Wightman, 78 Ill. 553. And so, where an agent exceeded his instructions and added to the terms of sale a clause very disadvantageous to his principal. Baxter *v.* Lamont, 60 Ill. 237. See Bristol Knife Co. *v.* First Nat. Bank of Hartford, 41 Conn. 421; Philpot *v.* Taylor, 75 Ill. 309. — Ed.]

him, notwithstanding any private secret instructions, which restrict or vary that authority.[1] But, if the person dealing with such an agent has notice of such instructions or variations, he cannot acquire any title to the property, which is transferred in violation of them.[2]

§ 225. Similar considerations will apply to cases of general agency, where, from the usage of trade or otherwise, persons dealing with the agent have knowledge, that he is transcending the ordinary and accustomed modes of transacting the like business; for they are presumed to understand the restrictions and limitations, thus imposed upon the general agency, and are bound by them. Thus, a person dealing with a factor or broker is bound to know, that, by law, a factor or broker, although a general agent, is not clothed with authority to pledge, deposit, or transfer the property of his principal for his own debts; and, if he receives such a deposit or pledge, the title is invalid, and the property may be reclaimed by the principal.[3] And in such a case, it is wholly immaterial whether the pledgee knew that the party with whom he was dealing was a factor or broker, or not. If he knew the fact, he was also bound to know the law applicable to it. If he did not know the fact, his own ignorance would not, ordinarily, enlarge his rights against the principal; since the latter has not held him out to the public as having such an authority.[4]

§ 226. The same principle applies, where the act of the agent

[1] Ante, §§ 70–73, 126–133; [Sterling Bridge Co. *v.* Baker, 75 Ill. 139].

[2] Ibid. [Calais, &c. Co. *v.* Van Pelt, 2 Black (U. S.), 372.]

[3] Ante, § 113; Post, §§ 229, 389; Bouchout *v.* Goldsmid, 5 Ves. 211, 213; 3 Chitty on Com. & Manuf. 204, 205; Van Amringe *v.* Peabody, 1 Mason, 440; Boyson *v.* Coles, 6 M. & Selw. 14. [A factor with a power to sell the goods consigned to him has no right to pledge them, and if he does, the owner may reclaim them from the pledgee, although the latter had no notice of the rights of such owner, and had supposed the factor to be the actual owner. Gray *v.* Agnew, 14 Am. L. Rev. 457. Nor will the pledge be good in such a case, even for the amount of the factor's charges at the time. Merchants' Nat. Bank *v.* Trenholm, 12 Heisk. 520; City Bank *v.* Barrow, L. R. 5 App. Cas. 664. But where an agent pledged to a *bona fide* holder, bills of exchange, drawn on his principal, and payable to the order of the agent, it was held that the principal, having enabled the agent to hold himself out as the owner, was bound by the pledge, although it was made to secure a loan of money for the agent's own use. Clement *v.* Leverett, 12 N. H. 317. — Ed.]

[4] Newson *v.* Thornton, 6 East, 17; Jackson *v.* Clarke, 1 Younge & Jerv. 216; Glyn *v.* Baker, 13 East, 509; Barton *v.* Williams, 5 B. & Ald. 395; s. c. 3 Bing. 139; 3 Chitty on Com. & Manuf. 204, 205; 2 Kent, Comm. Lect. 41, pp. 625, 626 (4th ed.); [Gray *v.* Agnew, 14 Am. L. Rev. 457].

is not justified by the usage of trade. Thus, for example, by the usage of trade, a sale of goods may ordinarily be made by a factor on credit; but, by the like usage of trade, a sale of stock by a broker is always understood to be a sale for ready money.[1] Hence, if a broker should sell stock on a credit, the sale would be invalid; and the principal would be entitled to recover it back.[2]

§ 227. Cases, indeed, may arise, in which the principal may be bound; as, if he has clothed the agent with all the apparent muniments of an absolute title, and authorized him to dispose of the property, as sole owner, and the pledgee has no notice of the agency.[3] Thus, although a broker, employed to purchase, has ordinarily no authority to sell; still, if the principal invests him with the apparent legal ownership, he will be bound by a sale made by the broker.[4]

§ 228. This latter principle lies at the foundation of the well-established doctrine, that if an agent is intrusted with the disposal of negotiable securities or instruments, and he disposes of them by sale, or pledge, or otherwise, contrary to the orders of his principal, to a *bona fide* holder without notice, the principal cannot reclaim them; for it is said, that the title of the holder, in cases of negotiable instruments, is derived from the instrument itself, and not from the title which the party has, from whom he received them.[5] But the better reason is, that the principal, in all such cases, holds out the agent, as having an unlimited authority to dispose of and use such instruments, as he may please. And, indeed, negotiable instruments, when indorsed in blank, or payable to bearer,

[1] Ante, §§ 60, 106, 110.

[2] Wiltshire *v.* Sims, 1 Camp. 258; Post, § 229; [White *v.* Fuller, 67 Barb. 267].

[3] Boyson *v.* Coles, 6 M. & Selw. 14; Post, § 443. This constitutes the very difficulty, as to the doctrine of the non-existence of a right to pledge by a factor. As a new question, there might be great reason to contend, that a factor, being clothed with the apparent possession and ownership, has a right to pledge, as the exercise of a minor right than that of selling. But the point has been too firmly established by adjudication to admit of further judicial controversy. See Ante, §§ 73, 113, 126–133; Post, §§ 419–421; [Turnbull *v.* Thomas, 1 Hughes, 172].

[4] Baring *v.* Corrie, 2 B. & Ald. 137, 145; 2 Kent, Comm. Lect. 41, pp. 626, 627 (4th ed.); 3 Chitty on Com. & Manuf. 202; Pickering *v.* Busk, 15 East, 38; Whitehead *v.* Tuckett, 15 East, 400; Boyson *v.* Coles, 6 M. & Selw. 14; Martini *v.* Coles, 1 M. & Selw. 140; Laussatt *v.* Lippincott, 6 Serg. & R. 386; Moore *v.* Clementson, 2 Camp. 22; Story on Bailm. §§ 324–326; [McNeilly *v.* Cont. Ins. Co., 66 N. Y. 23; Roach *v.* Turk, 9 Heisk. 708].

[5] Coddington *v.* Bay, 5 John. Ch. 54; s. c. 20 John. 637.

are treated as a sort of currency, and pass in the market without inquiry as to the title of the holder;[1] and the negotiability of all instruments would be greatly impaired, if not wholly destroyed, by a different doctrine.[2] Of course, the doctrine does not apply to

[1] Miller *v.* Race, 1 Burr. 452; Grant *v.* Vaughan, 3 Burr. 1516; Peacock *v.* Rhodes, Doug. 633; Bolton *v.* Puller, 1 Bos. & Pull. 539; Collins *v.* Martin, 1 Bos. & Pull. 648.

[2] Questions under this head most commonly arise, where negotiable instruments have come into the hands of bankers. The leading principles on this subject have been collected by Mr. Lloyd, in a note to Paley on Agency, by Lloyd, p. 91, note, which, as of general practical utility, is here transcribed. "As the subject" (says he) "here treated of is one of great importance to all persons engaged in trade, it may be well to state, concisely, what is conceived to be the present state of the law affecting it. And (1.) A banker is to be considered as the agent of his customer. If property of the customer come into his hands, to be dealt with in a particular manner, he is, as to that property, the factor of the customer, having the rights and liabilities belonging to that character. (2.) Bills not due, paid in by a customer to his banker are, in the absence of evidence to the contrary, presumed to be placed with him as an agent to procure the payment of them when due, and in such cases the property remains in the customer. Giles *v.* Perkins, 9 East, 12. (3.) If they are indorsed by the customer, the legal property in them is changed. Lang *v.* Smyth, 7 Bing. 284. (4.) And, if they are also discounted by the banker for the customer, they become the absolute property of the banker, and of course pass to his assignees, as part of his estate; Carstairs *v.* Bates, 3 Camp. 301; and the indorsement is *prima facie* evidence of discounting. *Ex parte* Twogood, 19 Ves. jr. 229. (5.) The taking of the banker's acceptances, in exchange for bills paid in and indorsed, is tantamount to a discounting, and, even though the banker's acceptances be dishonored, the bills will, nevertheless, pass to his assignees. Hornblower *v.* Proud, 2 B. & Ald. 327. (6.) But bills may be indorsed by the customer (and so the legal property be changed), and may yet remain in the hands of the banker, clothed with a trust for the customer; in which case, as has been already said, they do not pass to the assignees of the banker upon his bankruptcy. And the difficulty in most cases is, to determine whether such a trust exists or not. (7.) When the bills are entered short by the banker, that is to say, when they are entered as bills not yet available, and not carried to the general cash account, there is no doubt that they do not pass to the assignees, but must be given up to the customer. 1 Rose, 154. (8.) And even though the banker have entered them in his own books as cash, and allowed his customer credit in account generally upon them, this will not, of itself, affect the customer, as the banker's books can be no evidence for himself or his assignees. 1 Rose, 239. (9.) Much less, if the customer have expressly directed the banker to get payment of them when due, or forbidden him to negotiate them; or the course of dealing between them raise an inference of such direction or prohibition. 1 Rose, 243. (10.) If the customer have given the banker a limited authority to negotiate them under certain circumstances, as in reduction of the cash balance, when unfavorable or the like; this will, of course, not extend to other circumstances, or to more bills, than are sufficient for the purpose, and indeed will, of itself, negative any general authority to dispose of them. Ibid. (11.) But if a general au-

cases, where, upon the face of the instrument, there is a restricted authority; or, where the holder has knowledge, or notice, of the

thority to negotiate them had been either expressly given, or is to be inferred from the course of dealing known and assented to by the customer, then, it seems, the customer is to be considered as having abandoned all property in the bills, which, consequently, pass to the assignees. (12.) What circumstances are sufficient to raise the inference of such a general authority, is a question of some nicety. Lord Eldon seems to have been of opinion, that if the bills were entered as cash, with the knowledge of the customer, and he drew, or was entitled to draw, upon the banker, as having that credit in cash, he would thereby be precluded from recurring to the bills specifically. *Ex parte* Sargeant, 1 Rose, 153; *Ex parte* Sollers, Ib. 155; *Ex parte* Pease, Ib. 232; *Ex parte* The Wakefield Bank, Ib. 243; *Ex parte* The Leeds Bank, Ib. 254; and see 18 Ves. 229, 233; 19 Ves. 25, s. c. However, in all these cases his lordship held the assignees to very strict proof of such a course of dealing; and, in the absence of such proof, decided that there was no such general authority. The opinion of Lord Eldon, as conveyed in this *dictum*, has been adopted and acted upon by the present vice-chancellor, in a recent case of *Ex parte* Thompson, 1 Mont. & McArthur, 102, which was certainly a strong case; for there, in an account of four years, there were but three entries of actual cash paid, — the rest of the entries being entirely of bills, against which the remitters had been in the habit of drawing very extensively. On the other hand, it is said that it is immaterial whether such a general authority exists, either expressly or from the course of dealing, if, at the time of the bankruptcy, the bills, in fact, remained in specie in the hands of the bankers, and the cash balance were in favor of the customer. And, at all events, it is insisted the circumstance of the customer taking credit for the bills, and drawing, or considering himself entitled to draw against them, does not make them the bills of the banker; because, in the actual course of trade, such a privilege is a consequence of paying in bills. The former part of this proposition is the opinion of Mr. Deacon, and is not without the support of good reasoning, although it must be considered as doubtful. Law and Practice of Bankruptcy, vol. 1, p. 432. The latter part is borne out by the case of Thompson *v.* Giles, 2 B. & Cressw. 422; and *Ex parte* Armistead, 2 G. & J. 371. (13.) The right to reclaim extends not only to the specific bills or securities, but to the substitutes for, or proceeds of them, so long as they continue in the same hands and are specifically ascertainable. Vulliamy *v.* Noble, 3 Mer. 593. (14.) But if the proceeds cannot be distinguished from the general stock of the banker, the right of the general creditors prevails, and the customer must come in ratably with the rest. And herein consists, principally, the evil of the indorsing of the bills by the customer, as it gives the banker the opportunity of negotiating them. (15.) Neither can the customer follow them into the hands of third parties, who have obtained them *bona fide*, and for value, although negotiated by the banker against good faith. *Ex parte* Pease, 1 Rose, 232; Collins *v.* Martin, 1 Bos. & Pull. 648; Ibid. 546. (16.) The banker, like a factor, has a general lien for advances made, and a right to be indemnified for liabilities contracted on account of his principal, and the claim of the customer will consequently be modified by the state of the account. Therefore, if the cash balance is against the customer, or if the banker has advanced money specifically upon the bills remitted, or has accepted other bills for the

validity of the title;[1] or where he has acquired his title by fraud.[2] This subject will hereafter occur in other connections; and, therefore, may now be passed over without further comment.[3]

§ 229. And not only may the principal, in many cases, follow

accommodation of the customer, the assignees will have a right to retain the bills, and even to put them in suit, until those sums are repaid, and those liabilities discharged; that is to say, they will be entitled to a deduction of the amount in the first case, and to an indemnity in the second. Jourdaine *v.* Lefevre, 1 Esp. N. P. C. 66; Davis *v.* Bowsher, 5 T. R. 488; Scott *v.* Franklin, 15 East, 428; Bosanquet *v.* Dudman, 1 Stark. N. P. C. 1; Bolland *v.* Bygrave, R. & M. 271; *Ex parte* Waring, 2 G. & J. 403, and the cases before cited. (17.) It is a consequence of the right to an indemnity, that, although the holder of the banker's acceptances in favor of the customer cannot directly come in, and claim in his place as against the assignees of the banker; yet, if the customer also become bankrupt, while these acceptances are outstanding, as the holders must be satisfied before the assignees of customers can be entitled to the bills, the Court of Bankruptcy will order such an arrangement between the two estates, as to render the claim of the bill-holders indirectly available. *Ex parte* Waring, 2 Rose, 182; *Ex parte* Inglis, 19 Ves. 345; *Ex parte* Parr, Buck, 191." [See also Clark *v.* Merchants' Bank, 1 Sandf. Sup. Ct. (N. Y.) 498; Dows *v.* Nat. Exchange Bank, 91 U. S. 618; Woolen *v.* N. Y. & Erie Bank, 12 Blatch. C. C. 359; Nat. Bank of Commerce *v.* Merchants' Nat. Bank, 91 U. S. 92.]

[1] Treutell *v.* Barandon, 8 Taunt. 100; Collins *v.* Martin, 1 Bos. & Pull. 648; Sigourney *v.* Lloyd, 8 B. & Cressw. 622; Post, § 231.

[2] Solomons *v.* Bank of England, 13 East, 135, n.; Goodman *v.* Harvey, 4 Adolph. & Ellis, 870. What will amount to notice, or fraud, is in some cases a matter of great nicety. At one time, it was thought that receiving a negotiable instrument, under circumstances which might excite some suspicion, or amount to gross negligence in the holder, was sufficient to invalidate his title. But it is now settled, that the conduct of the holder must amount to *mala fides*, and even gross negligence will not avoid his title. Goodman *v.* Harvey, 4 Adolph. & Ellis, 870; Arbouin *v.* Anderson, 1 Adolph. & Ellis, New R. 498, 504. In this last case, Lord Denman said: "Acting upon the case of Goodman *v.* Harvey, which gives the law now prevailing on this subject, we must hold that the owner of a bill is entitled to recover upon it, if he has come by it honestly; that that fact is implied *prima facie* by possession; and that, to meet the inference so raised, fraud, felony, or some such matter, must be proved. Here is a possession not so accounted for; and I think the replication entitles the plaintiff to recover." Story on Bills of Exchange, §§ 193, 194, 415, 416. [Where A., as attorney for B., procured a judgment in favor of the latter against C., of whose intent to commit a fraud he had knowledge, it was held that his knowledge was imputable to B. Rogers *v.* Palmer, 102 U. S. 263. And a principal is bound by the representations of an agent employed to sell negotiable notes, that they are good business paper. Ferguson *v.* Hamilton, 35 Barb. 427. See Mackintosh *v.* Eliot Nat. Bank, 123 Mass. 393; Bank of Kansas City *v.* Mills, 24 Kansas, 604; Phelan *v.* Moss, 67 Pa. St. 59; Welch *v.* Sage, 47 N. Y. 143; Hamilton *v.* Vought, 34 N. J. 187; Murray *v.* Lardner, 2 Wall. 110. — Ed.]

[3] Post, §§ 231, 404–406, 419–421.

his own property into the hands of third persons, where it has been transferred or disposed of by an agent, contrary to his instructions, or duty, but the principle is still more extensive in its reach; for, if it has been converted into, or invested in other property, and can be distinctly traced, the principal may follow it, wherever he can find it, and as far as it can be thus traced, subject, however, to the rights of a *bona fide* purchaser for a valuable consideration without notice, in all cases where the latter is entitled to protection.[1] It will make no difference, in law, as, indeed, it does not in reason, what change of form, different from the original, the property may have undergone, whether it be changed into promissory notes or other securities, or into merchandise, or into stock, or into money.[2] For the product of the substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such; and the right only ceases, when the means of ascertainment fail; which is the case, when the subject, being goods, is turned into money, which is mixed and confounded in a general mass of the

[1] Ante, §§ 227, 228; Post, § 231; Taylor *v.* Plumer, 3 M. & Selw. 562; Ante, §§ 225, 226; Post, §§ 436–439. [The principle, with its limitations, is thus stated by Mr. Justice Merrick in Le Breton *v.* Peirce, 2 Allen (Mass.), 8: "Property covered by a trust may always be reclaimed, wherever it may be found; and no change of its form, state, or condition can relieve it from, or divest it of, the trust, or give to the agent or trustee by whom it is converted, or those who represent him in right, whether as executors, administrators, assigns, or purchasers, with notice and without consideration, any more valid claim in respect to it than they severally had before the change took place. It is of no consequence into what form different from the original the change may have wrought it, whether it be that of goods, chattels, notes, stock, or coin; for the product, as a substitute for the original thing, still follows the nature of the thing itself, so long as it can be ascertained to be such. These are the terms in which the law is laid down by Lord Ellenborough, as affirmed by the court in the carefully considered case of Taylor *v.* Plumer, 3 M. & S. 562. And Judge Story, who borrows his language, after declaring that the principle has a universality of application in equity, adds that it is fully recognized at law in all cases where it is susceptible of being brought out as a ground of action or defence in a suit at law. 2 Story on Eq. § 1258." — G.] [Fox *v.* Hawks, L. R. 13 Ch. D. 822; Meiggs *v.* Meiggs, 15 Hun (N. Y.), 453.]

[2] Scott *v.* Surman, Willes, 400; Whitcomb *v.* Jacob, 1 Salk. 160; Ryall *v.* Rolle, 1 Atk. 172; Lane *v.* Dighton, Ambler, 409; Thompson *v.* Perkins, 3 Mason, 232; Hourquebie *v.* Gerard, 2 Wash. Cir. 212; Chedworth *v.* Edwards, 8 Ves. 49; Lench *v.* Lench, 10 Ves. 511; Jackson *v.* Clarke, 1 Y. & Jerv. 216; [Greene *v.* Haskell, 5 R. I. 447: and in Bertholf *v.* Quinlan, 68 Ill. 297, it was held that where an agent exchanges the property of his principal without authority, the fact that he was liable to his principal therefor was no defence to an action of trover against the party receiving the principal's property. — ED.]

same description; or when the subject, being money, has been converted into specific property of another kind, having before that time lost, as it were, its ear-mark and identity, and become incapable of being distinguished from the mass of the common moneys of the agent.[1] But money in a bag, or otherwise kept apart from other money, or guineas, or other coin, marked or otherwise specially designated, for the purpose of being distinguished, is treated as so far ear-marked, as to fall within the rule already stated, while it remains in the hands of the agent, or of his general personal representatives.[2]

§ 230. The same doctrine is still more fully acted upon in courts of equity; for, if an agent or trustee has wrongfully invested the money or trust property of the principal, or *cestui que trust*, in land, and it can be distinctly traced, equity will follow it into the land, and hold the legal owner to be a trustee thereof for the benefit of the party whose money or trust property has been so invested.[3]

§ 231. The foregoing cases turn upon the wrongful conduct of the agent in the discharge of his appropriate duties. But the remedy of the principal, to recover back his own property, is not confined to cases where there has been some tortious conversion of it. On the contrary, if there has been no misconduct in the agent, the principal is entitled, in all cases, where he can trace his property, whether it be in the hands of the agent, or of his representatives or assignees, or of third persons, to reclaim it, unless it has been transferred *bona fide* to a purchaser without notice; subject, however, to the lien and other rights of the agent. And, in such cases, it is wholly immaterial, whether the property be in its original state, or has been converted into money, or securities, or negotiable instruments, or other property, so only that it

[1] Ibid.; Conard *v.* Atlantic Ins. Co. 1 Peters, Sup. Ct. 386.

[2] Taylor *v.* Plumer, 3 M. & Selw. 562, 576; Whitcomb *v.* Jacob, 1 Salk. 160; Scott *v.* Surman, Willes, 400; Godfrey *v.* Furzo, 3 P. Will. 185. The judgment of Lord Ellenborough, in Taylor *v.* Plumer, 3 M. & Selw. 562, on this whole subject, is very masterly, and contains a thorough review of all the authorities on the subject-matter of the text. See also Jackson *v.* Clarke, 1 Y. & Jerv. 216.

[3] Lane *v.* Dighton, Ambler, 409; Lench *v.* Lench, 10 Ves. 517; Boyd *v.* McLean, 1 John. Ch. 582. [This rule applies to trust money which has gone by means of an agent's fraud into the treasury of the U. S. Government. United States *v.* State Bank, 96 U. S. 30. See Cooke, *Ex parte*, re Strachan, L. R. 4 Ch. D. 123. — Ed.]

is distinguishable and separable from the other property and assets of the agent, and has an ear-mark or other appropriate identity.[1] Upon this same ground, if an agent purchases property for his principal, and takes a bill of sale in his own name, paying the money of his principal therefor, the latter may compel the agent to transfer the property to him.[2] This is a very important right, especially in cases of the bankruptcy, insolvency, or death of the agent.

§ 231 *a*. Cases may also arise, where agents will be responsible to their principals for money of the latter, received by sub-agents, although the money has never reached the hands of the agents. Thus, for example, if an agent is employed to collect and receive payment of bills of exchange, due to the principal, and the agent transmits them to his own private agent to recover the money on the same bills, and orders such sub-agent to place the amount, when received, to his (the agent's) credit, payment to such sub-agent is payment to the original agent; and the principal will be entitled to recover the amount from the agent, although the same may be lost by the failure and insolvency of the sub-agent; for in such case the loss properly falls on the agent, and not on the principal.[3] *A fortiori*, this doctrine will apply, where the amount in the hands of the sub-agent is drawn for by the agent, by a bill in favor of a third person, and the bill has been accepted by the sub-agent before his failure and insolvency.[4]

[1] Taylor *v.* Plumer, 3 M. & Selw. 562; Veil *v.* Mitchell's Adm'rs, 4 Wash. Cir. 105; Thompson *v.* Perkins, 3 Mason, 232; Scott *v.* Surman, Willes, 400; Jackson *v.* Clarke, 1 Y. & Jerv. 216; Ante, §§ 228, 229.

[2] Hall *v.* Sprig, 7 Miller (La.), 245.

[3] Taber *v.* Perrott, 2 Gall. 565; Ante, § 201; Post, § 429.

[4] [Where the agency is such that a sub-agent must be employed, who is not subject to his immediate employer's control, the agent, if he discharges his own duty faithfully, is not responsible to the principal for the acts or omissions of the sub-agent. Thus, where agents employed to ship cotton used due diligence in securing a vessel for that purpose, but by the delay of the captain a loss occurred, the agents were held not to be liable for the loss. McCants *v.* Wells, 4 So. Car. 381. But where the principal gave a note to an agent with instructions not to let it go out of his hands without receiving the money for it, and the agent thereupon delivered the note to a third party to get it discounted, which the latter did, and appropriated the proceeds, the agent was held responsible to his principal. Laverty *v.* Snethen, 68 N. Y. 522. So, where a collection agency, employed to collect a claim, placed said claim in the hands of an attorney who lost it. Morgan *v.* Tener, 83 Pa. St. 305; Swett *v.* Southworth, 125 Mass. 417. So, where a bank to which a draft was sent for collection, forwarded it to another bank which was nearer the drawee, and the latter

§ 232. The remarks, which have been already made, as to the responsibility of agents to their principals, apply not only to cases of a sole agency, but also to those of a joint agency. Where joint agents are employed, who have a common interest, they are liable for the acts, misconduct, and omissions of each other, in violation of their duty. Thus, for example, joint factors are liable for each other's doings and omissions; and it will be no discharge of one, that the business has been, in fact, wholly transacted by the other, with the knowledge of the principal; for in such cases, the principal still trusts to the joint responsibility.[1] And if the joint agents are to receive a joint commission, or to share in the profits of their business, it will make no difference in their responsibility to the principal, that it is privately agreed between themselves, that neither shall be liable for the acts or losses of the other, but each is to be liable only for his own.[2]

§ 233. The Roman law adopted a similar doctrine, as founded in a most persuasive equity. Thus, in the Digest, the language of Scævola is approved: "Duobus quis mandavit negotiorum administrationem; quæsitum est an unusquisque mandati judicio in solidum teneatur? Respondi; unumquemque pro solido conveniri debere; dummodo ab utroque non amplius debito exigatur."[3]

§ 234. The liabilities of agents, which we have been thus far considering, are those which arise by the general principles of law, independent of any special contracts made by the particular parties. It is, of course, competent for the parties to vary, or restrict, or enlarge, these general liabilities, by contract, according to their pleasure, with the exception, that no contract can be valid which stipulates to exempt agents from responsibility for their own fraudulent acts. Such a stipulation would be against good morals and public policy, and would be treated therefore as utterly void.[4] In a treatise like the present, it is not necessary to consider what would be the true interpretation or result of particular stipulations of this sort. Con-

having received payment of it, failed. Kent *v.* Dawson Bank, 13 Blatch. C. C. 267. So, where an agent to sell machines appointed a sub-agent to assist him, and the latter sold one machine to an insolvent party on credit. Pownall *v.* Bair, 78 Pa. St. 403. See Bank of Kentucky *v.* Adams Ex. Co., 93 U. S. 174; Williams *v.* White, 70 Maine, 138. — Ed.]

[1] Wells *v.* Ross, 7 Taunt. 403; [Price *v.* Keyes, 62 N. Y. 378].

[2] Godfrey *v.* Saunders, 3 Wils. 94; Waugh *v.* Carver, 2 H. Bl. 235.

[3] Dig. Lib. 17, tit. 1, l. 60, § 2; 1 Domat, B. 1, tit. 15, § 3, art. 13.

[4] Story on Bailm. § 32; Dig. Lib. 50, tit. 17, l. 23; Jones on Bailm. 11, 48; Heinecc. Elem. Jurist. Inst. Ps. 3, Lib. 3, tit. 14, § 785.

tracts for a *del credere* commission which amount to a guaranty of debts contracted on sales by factors and others, are, however, of so common and general a character, that they may be properly taken notice of, as an appropriate illustration of the enlarged responsibility of agents resulting from contract. The nature and effect of this species of contract have been already considered.[1]

[1] Ante, §§ 33, 112, 215.

CHAPTER IX.

DEFENCES OF AGENTS AGAINST PRINCIPALS.

§ 235. In this connection, the consideration naturally arises of those matters which may properly be urged by agents, by way of defence or excuse, to repel the actions and claims brought against them by their principals, for violations or omissions of duty, or other delinquencies, touching their agencies. Some of these have been already incidentally mentioned; but a short recapitulation, in this place, may not be without use. In the first place, the agent may insist, as a matter of defence, that the subject-matter of the agency is an illegal or an immoral transaction, or is founded in fraud, or against public policy; in all which cases, the principal will not be allowed to maintain any suit for redress of any sort against the agent, touching that transaction.[1] And this doctrine not only applies to suits founded upon matters of account, or receipts of money, or non-fufilment of contracts by the agent in the course of such illegal transactions, or flowing therefrom; but it applies equally to the recovery back of the property which has been intrusted to him, when it has been actually employed in such illegal, fraudulent, or immoral purposes.[2] Thus, if goods are intrusted to an agent, to be smuggled into a country, and sold there against its laws, the principal will be equally disabled to maintain a suit against the agent in the courts of that country for the goods

[1] Ante, §§ 195, 222; Baxwell *v.* Christie, Cowp. 395; Webster *v.* De Tastet, 7 T. R. 157; Simpson *v.* Nicholas, 3 Mees. & Wels. 240; Story on Conflict of Laws, §§ 243–262; 1 Story on Eq. Jurisp. §§ 296–308; Thomson *v.* Thomson, 7 Ves. 470; Canaan *v.* Bryce, 3 B. & Ald. 179; Langton *v.* Hughes, 1 M. & Selw. 593; Le Guen *v.* Gouverneur, 1 John. Cas. 436.

[2] Ibid.; Post, §§ 344–347. [Thus, where the plaintiff and his book-keeper shared the gains from illegal sales of whiskey, the fact that the book-keeper was the more immediate participant in the fraud will not enable his principal to sue for his own share of the illicit gains. Curran *v.* Downs, 7 Mo. App. 329; but in Pointer *v.* Smith, 7 Heisk. 137, it was held that an agent receiving such profits cannot set up in a suit by his principal the illegal character of the transaction in which they were realized, if they were received by him on his principal's account; and to the same effect in Murray *v.* Vanderbilt, 39 Barb. 140. — Ed.]

themselves, as he will be to maintain a suit for the proceeds of the goods, if sold. The rule, in all such cases, is, "Melior est conditio possidentis."[1]

§ 236. In the next place, as we have seen, it is a good defence, or rather a good excuse, that the misconduct of the agent has been followed by no loss or damage whatsoever to the principal; for then the rule applies, that although it is a wrong, yet it is without any damage; and, to maintain an action, both must concur; for

[1] Edgar *v.* Fowler, 3 East, 222. The doctrine in the text is (I conceive) the true doctrine, notwithstanding some apparent discrepancies in the authorities. Perhaps, where moneys, or goods, are deposited with an agent, to effect an illegal object, and before any thing is done, the principal repents, and revokes the orders, he may recover back the money; for he may have, until there is some part execution of the authority, a *locus pœnitentiæ*. See *Ex parte* Bulmer, 13 Ves. 313; Taylor *v.* Lendey, 9 East, 49; Hastelow *v.* Jackson, 8 B. & Cressw. 222. But, if the moneys, or goods, have been actually put into a course of execution of the illegal purpose, it will be otherwise. Thus, if goods have been delivered to an agent, to be smuggled into the country, and they have been actually shipped and smuggled into the country, the principal cannot recover them from the agent who withholds them from him. So, if moneys are invested in goods for a like purpose, the money, or goods, cannot afterwards be recovered by the principal from the agent. In such cases, the right to recover is necessarily founded upon the very contract for illegal purposes. But, where the recovery from an agent is not sought through, or upon, the illegal contract, but upon a new collateral contract, not illegal, there it may be recovered. Thus, if an agent has received money from third persons for his principal by his authority, which money accrued from an illegal transaction, between the principal and such third persons, who had no connection with the agent, the principal may recover it from his agent, for, as between them, the receipt of the money for the principal is upon a legal contract, although the money itself accrued under a former illegal transaction. It is upon some ground of this sort, that we are to understand the cases of Faikney *v.* Reynous, 4 Burr. 2069, and Petrie *v.* Hanney, 3 T. R. 418, 419; Thomson *v.* Thomson, 7 Ves. 470; Farmer *v.* Russell, 1 Bos. & Pull. 296; Tenant *v.* Elliott, 1 Bos. & Pull. 3. See *Ex parte* Bulmer, 13 Ves. 313; Steers *v.* Lashley, 6 T. R. 61; Booth *v.* Hodgson, 6 T. R. 405; Sullivan *v.* Greaves, 6 T. R. 406, n. Indeed, some of these cases have been greatly doubted, and especially Faikney *v.* Reynous, 4 Burr. 2069, and Petrie *v.* Hanney, 3 T. R. 418. See Aubert *v.* Maze, 2 Bos. & Pull. 371; Canaan *v.* Bryce, 3 B. & Ald. 179; Bensley *v.* Bignold, 5 B. & Ald. 335; *Ex parte* Daniels, 14 Ves. 191. In Canaan *v.* Bryce, 3 B. & Ald. 179, it was held, that money, lent to a party to be applied by the borrower to settle illegal transactions, could not be recovered from the borrower. So, in McKinnell *v.* Robinson, 3 Mees. & Wels. 434, it was held, that money, lent for gaming to the borrower, could not be recovered from the latter. Indeed, it seems difficult to perceive, how either money, or goods, placed in the hands of an agent for illegal purposes, can be recovered back by the principal, as the delivery of the money, or goods, is in part execution of such purposes; and the possession of the agent is a direct result of the agreement to execute such purposes.

damnum absque injuriâ and *injuria absque damno*, are, in general, equally objections to any recovery.[1]

§ 237. In the next place, the agent may defend himself by showing that, although he has violated his instructions or orders, or he has not otherwise performed his undertaking, yet he has acted under an overwhelming necessity, or has been prevented from acting by a like calamity; or, that what he has done has been from an unexpected or unforeseen emergency, to which the instructions or orders did not, or could not apply; or, if they did apply, that he was compelled to act in order to prevent a greater loss or absolute ruin to his principal.[2]

§ 238. In the next place, it is a good matter of defence to an action brought by the principal against his agent, for negligence in the performance of his duty, that, if the act had been properly done, the principal could have derived no benefit from it, but it would have been merely void, upon grounds of public policy.[3] Upon this ground it was formerly held, that, if an agent sells goods to be delivered at a future day, and, at the time, the principal neither has the goods, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them on consignment, but he means to go into the market and buy the goods, which the agent has contracted to deliver, no action will lie against the agent for any negligence in such sale; because the principal himself cannot maintain an action upon such a contract of sale made by himself; since such a contract amounts, on the part of the vendor, to a wager on the price of the commodity, and is attended with such mischievous consequences, as to be prohibited

[1] Ante, § 222; Post, § 238.

[2] Ante, §§ 85, 118, 193–197, 208; 3 Chitty on Com. & Manuf. ch. 3, p. 218; The Gratitudine, 3 Rob. 240–257; Dusar *v.* Perit, 4 Binn. 361; Forrestier *v.* Bordman, 1 Story, 43. [Thus, it was held to be a good defence for the agent that his principal's cotton was taken out of his control by the military authorities of the Confederate States and ordered to be burned, whether it was afterwards burned or not, so long as it was out of the agent's power to regain peaceable possession thereof. Weakly *v.* Pearce, 5 Heisk. 401. So, where the military authorities of the U. S. seized hay which was sent by its owner to New Orleans during the war, for sale, and paid for it in government certificates of indebtedness, which were only worth ninety-three per cent of their face value, and the consignees, without notice to the owner, but according to the custom of factors at that time, accepted the certificates, it was held that they were not liable to the owner for the full value of the certificates. Greenleaf *v.* Moody, 13 Allen, 363. See Shaw *v.* Stone, 1 Cush. 228. — Ed.]

[3] Ante, §§ 222, 235.

by public policy.[1] This case has been since overruled;[2] but, although it can no longer be relied on as a fit illustration of the doctrine above stated; yet there can be no doubt, that the principle on which it is founded is entirely correct, that the principal cannot avail himself of a right of action against his agent for negligence or misconduct in a contract between them, which is against public policy. Supposing, however, the case really to be, in the understanding and contemplation of both parties, a mere wager on the future state of the markets, although in the form of a contract of sale, there can be little doubt, that it ought to be deemed a gaming speculation, which no court should enforce or encourage, and which, at least in states where mere wagers are held to be void at the common law, as against public policy, would be held incapable of sustaining any action for any breach of the contract.[3]

[1] Bryan *v.* Lewis, 1 Ryan & Mood. 386.

[2] Hibblewhite *v.* M'Morine, 5 Mees. & Wels. 462. In this case Mr. Baron Parke said: "I have always entertained considerable doubt and suspicion as to the correctness of Lord Tenterden's doctrine in Bryan *v.* Lewis; it excited a good deal of surprise in my mind at the time; and, when examined, I think it is untenable. I cannot see what principle of law is at all affected by a man's being allowed to contract for the sale of goods, of which he has not possession at the time of the bargain, and has no reasonable expectation of receiving. Such a contract does not amount to a wager, inasmuch as both the contracting parties are not cognizant of the fact, that the goods are not in the vendor's possession; and, even if it were a wager, it is not illegal, because it has no necessary tendency to injure third parties. The *dictum* of Lord Tenterden certainly was not a hasty observation, thrown out by him, because it appears from the case of Lorymer *v.* Smith, that he had entertained and expressed similar notions four years before. He did not, indeed, in that case, say that such a contract was void, but only, that it was of a kind not to be encouraged; and the strong opinion he afterwards expressed appears to have gradually formed in his mind during the interval, and was, no doubt, confirmed by the effects of the unfortunate mercantile speculations throughout the country about that time. There is no indication in any of the books of such a doctrine having ever been promulgated from the bench, until the case of Lorymer *v.* Smith, in the year 1822; and there is no case, which has since been decided on that authority. Not only, then, was the doubt expressed by Bosanquet, J., in Wells *v.* Porter, well founded, but the doctrine is clearly contrary to law." Mr. Baron Alderson and Mr. Baron Maule fully supported the same doctrine. Ante, § 49, note.

[3] By the civil law, things not in existence, or possession, or ownership, might be sold. Thus, for example, fruits, which shall be gathered and are not yet in existence, animals not yet born, the next grapes of a vineyard, the wine of the next vintage may be sold. Nec emptio nec venditio sine re, quæ veneat, potest intelligi. Et tamen fructus, et partus futuri recte ementur; ut, cum editus esset partus, jam tunc, cum contractum esset negotium, venditio facta intelligitur. Dig. Lib. 18, tit. 1, l. 8; Pothier, Pand. Lib. 18, tit. 1, n. 4–6.

§ 239. But the most important point of defence, usually occurring in practice to suits for breaches of duty by agents, is that which involves the question of a ratification, by the principal, of the acts or doings or omissions of his agent. Where the princi-

Here, the distinction is clearly taken between an executed sale, and a contract of sale, or executory sale. Each is good. Sed, si id egerit venditor, ne nascatur, aut fiant, ex empto agi posse. Dig. Lib. 18, tit. 1, l. 8; Pothier, Pand. Lib. 18, tit. 1, n. 6; Pothier, Contrat de Vente, n. 5–7. So a mere hope, or expectation in a thing, could be sold; as, for example, the next draught of a fish-net, or capture by a bird-trap, or bird shot. Aliquando tamen, et sine re, venditio intelligitur; veluti, cum quasi alea emitur; quod fit, cum captus, piscium, vel avium, vel missilium emitur; emptio enim contrahitur, etiamsi nihil inciderit, quia spei emptio est. Dig. Lib. 18, tit. 1, l. 8, § 1. See also Pothier, Pand. Lib. 18, tit. 1, n. 8; 1 Domat, B. 1, tit. 2, § 4, art. 3, 4; Heinecc. Elem. Jur. Instit. Lib. 3, tit. 24, § 905; Pothier, Contrat de Vente, n. 5–7. See Mr. Cushing's valuable translation of Pothier on Sale, n. 5–7, pp. 4, 5. So, by the civil law, a sale, and a contract of sale, could be made by a person who was not owner, even without the consent of the owner. Rem alienam distrahere quem posse, nulla dubitatio est; nam emptio est et venditio. Sed res emptori auferri potest. Dig. Lib. 18, tit. 1, l. 28; Pothier, Pand. Lib. 18, tit. 1, n. 18; 1 Domat, B. 1, tit. 2, § 4, art. 13; Pothier, Contrat de Vente, n. 7; Pothier on Oblig. n. 133, 136. Contracts for the sale of things, which the seller has not at the time, are very common in stock-jobbing transactions; and, if the doctrine in the case of Bryant *v.* Lewis, 1 Ryan & Mood. 386, Ante, § 238, be correct, then, it would seem, that upon the principles of the common law, no action could be maintained by the seller for the price, upon a sale of stock, deliverable at a future day, which the seller did not then own, or had not a title to; but which he meant to buy in the market at or before the day of delivery. And, if the buyer also knew the facts, he could not maintain an action for the non-delivery under the same contract. It would seem, from the case of Cud *v.* Rutter, 1 P. Will. 570; s. c. 5 Vin. Abridg. p. 538, pl. 21, that such stock contracts were not properly the subjects of an immediate sale, since no sale can be without a present thing, on which it can operate. But they might properly constitute the subject of a contract of sale, to operate and take effect *in futuro*. See 2 Bl. Comm. 446. [By the Roman law, any thing which might be the subject of property could be sold: things corporeal and things incorporeal, as easements and choses in action; things in existence and things not in existence; one's own property, and the property of others than the vendor. A sale by that law was a contract differing materially both from the contract to sell and from the sale of the English law, and partaking of the nature of both. It did not change the property in the thing sold, but still put it at the risk of the purchaser; holding, however, the vendor to the exercise of the care of a careful person in its custody and for its preservation. The contract was complete as soon as the parties were agreed upon the article to be sold and the price to be paid. "If the sale of the property of another was permitted by the Romans, the explanation is simply that the Latin word *vendere* does not signify to sell, but to bind one's self to furnish." Si la vente de la chose d'autrui était permise chez les Romains, c'est tout simplement parce que le mot latin *vendere* ne signifie pas *aliéner*, mais signifie *s'obliger à fournir*. Demangeat, Droit Romain, vol. ii. p. 315. — G.]

pal, upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings, or omissions of his agent, he will be bound thereby, as fully, to all intents and purposes, as if he had originally given him direct authority in the premises, to the extent which such acts, doings, or omissions reach.[1] The maxim of the common law is, and has been fully adopted into maritime and commercial jurisprudence, "omnis ratihabitio retrotrahitur, et mandato priori æquiparatur."[2] This most useful and convenient

[1] [The principal, before a ratification becomes effectual against him, must be shown to have had previous knowledge of all the material facts and circumstances in the case; and if he assented or confirmed the act of his agent while in ignorance of all the circumstances, he can afterwards, when informed thereof, disaffirm it. Bannon *v.* Warfield, 42 Md. 22; Adams Express Co. *v.* Trego, 35 Md. 47; Hardeman *v.* Ford, 12 Ga. 205; Billings *v.* Morrow, 7 Cal. 171; Pittsburgh & Steubenville R. R. Co. *v.* Gazzam, 32 Pa. St. 340; Kerr *v.* Sharp, 83 Ill. 199; Stein *v.* Kendall, 1 Ill. App. 103; Ritch *v.* Smith, 82 N. Y. 627; Fitzgerald *v.* Dressler, 7 C. B. N. S. 374. And the principal's want of such knowledge, even if it arises from his own carelessness in inquiring, or neglect in ascertaining the facts, or from other causes, will render such ratification invalid. His knowledge is an essential element. Combs *v.* Scott, 12 Allen, 493; Commercial Bank *v.* Jones, 18 Tex. 811; Lewis *v.* Read, 13 M. & W. 834; Freeman *v.* Rosher, 13 Q. B. 780. And the principal can disaffirm the act even after the sale has been completed, if he informs the vendor at once of his discovery, and offers to return the article which he has bought. Thompson *v.* Craig, 16 Abb. Pr. N. S. 29. So, where one without authority sold the plaintiff's chattel to the defendant and received in payment a bank check which he indorsed and gave the plaintiff for a debt which he owed the plaintiff, and the latter in ignorance of the sale collected the check and applied the proceeds to the payment of that debt, it was held that he had not ratified the sale thereby, and could collect value of the chattel from the purchaser. Thacher *v.* Pray, 113 Mass. 291. See White *v.* Morgan, 42 Iowa, 113; Frixione *v.* Jagliaferro, 10 E. F. Moore, 174; Grant *v.* Beard, 50 N. H. 129; Vincent *v.* Rather, 31 Tex. 77; Bank of Owensboro' *v.* Western Bank, 13 Bush (Ky.), 526; Dickinson *v.* Conway, 12 Allen, 487; McIntyre *v.* Park, 11 Gray, 102. — ED.]

[2] Post, § 445; Co. Litt. 207; Wolf *v.* Horncastle, 1 Bos. & Pull. 316; 3 Chitty on Com. & Manuf. 197, 198; Armstrong *v.* Gilchrist, 2 John. Cas. 424; 4 Coke, Ins. 317; Smith on Merc. Law, 47, 60; Odiorne *v.* Maxcy, 13 Mass. 178; Conn *v.* Penn, 1 Peters, Cir. 496; Pratt *v.* Putnam, 13 Mass. 361; Fisher *v.* Willard, 13 Mass. 379; Boynton *v.* Turner, 13 Mass. 391; Copeland *v.* Merchants' Insur. Co. 6 Pick. 198; Prince *v.* Clark, 1 B. & Cressw. 186; Horsley *v.* Bell, 1 Brown, Ch. 101, note; S. C. Ambler, 770; Den *v.* Wright, 1 Peters, Cir. 72; Breedlove *v.* Wamack, 14 Martin, 181; Buchanan *v.* Upshaw, 1 Howard, Sup. Ct. 56; S. C. 17 Peters, 70; [McCracken *v.* San Francisco, 16 Cal. 591. The Dean and Chapter of Exeter brought an assize of "novel disseisin against Serle de Lanlazaron, and complained that they were disseised of a hundred shillings of rent in N. Serle and the others came not, and the assize was awarded by reason of their default. The Assize, being sworn, said, that Serle and the Dean had made an exchange of certain tenements, and that Serle had charged the tenements, which the Dean had put in his view, with a

rule was as fully recognized in the Roman law: "Si quis ratum habuerit, quod gestum est, obstringitur mandati actione.[1] Rati

hundred shillings yearly, and had granted that whenever the rent should be in arrear the Dean should be at liberty to distrain; that the Dean came within the period of summons of the Eyre, and distrained for the rent; and that all those named in the writ, except Serle and two others, rescued, &c. — BRUMPTON. Was he assenting in any manner to the rescue which the others made? — The ASSIZE. The Dean and Chapter and Serle appointed a day for a compromise, but could not agree; and so it seems that he was assenting to the rescue. — BRUMPTON. Inasmuch as the rescue was made in Serle's name, and he assented to the act, we consider him as a principal disseisor. The reason is, as Brumpton then said, because *ratihabitio retro trahitur et mandato comparatur.*" Year Books, 30th Edw. 1, 128, A. D. 1302. In Bird *v.* Brown, 4 Ex. 786, where one assumed, without authority, to stop goods *in transitu*, on behalf of another, it was held that the latter could not ratify after a demand by the consignee by the carrier. Rolfe, B., in delivering the opinion of the court said: "The doctrine, Omnis ratihabitio retrotrahitur et mandato æquiparatur, is one intelligible in principle and easy in its application, when applied to cases of contract. If A. B., unauthorized by me, makes a contract on my behalf with J. S., which I afterwards recognize and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me; and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be: or, if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency; for he may sue A. B. as principal, at his option, and has the same equities against me, if I sue, which he would have had against A. B.

"In cases of tort, there is more difficulty. If A. B., professing to act by my authority, does that which *prima facie* amounts to a trespass, and I afterwards assent to and adopt his act, then he is treated as having from the beginning acted by my authority, and I become a trespasser, unless I can justify the act, which is to be deemed as having been done by my previous sanction. So far, there is no difficulty in applying the doctrine of ratification, even in cases of tort. The party ratifying becomes as it were a trespasser by estoppel; he cannot complain that he is deemed to have authorized that which he admits himself to have authorized.

"But the authorities go much further, and show that in some cases where an act which, if unauthorized, would amount to a trespass, has been done in the name and on behalf of another, but without previous authority, the subsequent ratification may enable the party on whose behalf the act was done, to take advantage of it, and to treat it as having been done by his direction. But this doctrine must be taken with the qualification, that the act of ratification must take place at a time, and under circumstances, when the ratifying party might himself have lawfully done the act which he ratifies. Thus, in Lord Audley's case (Cro. Eliz. 561; Moore, 457; Poph. 176, *nom.* Lord Awdeley's case), a fine, with proclamation, was levied of certain land, and a stranger within five years afterwards, in the name of him who had right, entered to avoid the fine. After the five years, and not before, the party who had the right to the land ratified and confirmed the act of the stranger. This was

[1] Dig. Lib. 50, tit. 17, l. 60; Pothier, Pand. Lib. 17, tit. 1, n. 19.

enim habitio mandato comparatur."[1] And the same rule was applied (as Cujacius informs us) even to the case of an unauthorized person (*negotiorum gestor*), who interfered in the concerns of another party: "Ratihabitio tamen facit, ut videatur negotium meum gestum, et erit mutua actio negotiorum gestorum. Verum est, esse negotiorum gestorum actionem, si ratum habuero; sed tentari potest, esse etiam mandati actionem. Nam ratihabitio duplicem vim habet, ut alienum negotium meum faciat, et habeat etiam vim mandati."[2] Pothier has commented on this doctrine in the following terms: "Et negotiorum gestorum actionibus locus est, quia sine mandato gestum est; et mandati etiam agi potest propter ratihabitionem, quæ æquipollet mandato. Electio est utriusque actionis."[3] Pothier has added: "Quin etiam et ratihabitio mandato æquipollet."[4] The modern nations of continental Europe, following the civil law, have adopted the same enlarged policy.[5]

§ 240. At the common law, however, there is a distinction between the ratification of acts, which are void, and the ratification of acts, which are voidable. In the former case, the ratification is inoperative for any purpose whatsoever; in the latter, full validity is given to the acts.[6] The groundwork of this distinction seems

held to be inoperative; though such ratification within the five years would probably have been good. Now, the principle of this case, which is reported in many books, and is cited with approbation by Lord Coke in Margaret Podger's case (9 Rep. 104 *a*), appears to us to govern the present. There the entry, to be good, must have been made within the five years: it was made within the time; but, till ratified, it was merely the act of a stranger, and so had no operation against the firm. By the ratification, it became the act of the party in whose name it was made; but that was not till after the five years. He could not be deemed to have made an entry till he ratified the previous entry, and he did not ratify until it was too late to do so. In the present case, the stoppage could only be made during the *transitus*. During that period the defendants, without authority from Illius, made the stoppage. After the stoppage was ended, but not before, Illius ratified what the defendants had done. From that time the stoppage was the act of Illius, but it was then too late for him to stop. The goods had already become the property of the plaintiffs, free from all right of stoppage." — G.]

[1] Dig. Lib. 46, tit. 3, l. 12, § 4. [See Fremont *v.* United States, 2 Nott & Hunt. Ct. of Claims, 461.]

[2] Cujac. ad L. 60, de Reg. Juris. (Lib. 50, tit. 17, l. 60) Tome 8, col. 784 (Neap. ed. 1758).

[3] Pothier, Pand. Lib. 17, tit. 1, n. 19, note (2); Pothier on Oblig. n. 75.

[4] Pothier, Pand. Lib. 17, tit. 1, n. 19; Id. Lib. 14, tit. 3, n. 18.

[5] Pothier on Oblig. n. 76. See the effect of a ratification of the acts of a sub-agent, Post, § 389.

[6] Co. Litt. 295 *b*, 306 *b*; and Ibid. Harg. and Butler's note (1); Gilb. on

to be, that a ratification of a void act only confirms it in its invalidity; which is a subtlety in reasoning, more dependent upon artificial and technical rules, than expressive of the real intent of the parties.[1]

§ 241. The principle is applied with far more justice and pro-

Tenures, 75; Dyer, 263, pl. 37; 1 Story on Equity Jurisp. § 307; Com. Dig. *Confirmation*, D. 1. [Thus, it was held in England, in Brook *v.* Hook, L. R. 6 Ex. 89, that a forgery could not be ratified even when the payee of a note whose name had been forged, after the note had been signed, and before its maturity, agreed in writing to hold himself responsible for the payment of the note; but in Wellington *v.* Jackson, 121 Mass. 157, it was held that a party who knows his signature to a note to be a forgery, and yet, intending to be bound by it, acknowledges it as his own, is as much bound by the note as if he had originally authorized it to be given in his name. And see Turner *v.* Keller, 66 N. Y. 66; Forsyth *v.* Day, 46 Me. 176; Greenfield Bank *v.* Crafts, 4 Allen, 447; Charles River Bank *v.* Davis, 100 Mass. 413; Livings *v.* Wiler, 32 Ill. 387; Howard *v.* Duncan, 3 Lans. 174; Union Bank *v.* Middlebrook, 33 Conn. 95. Where a city, in extending a street, was obliged to remove a part of a building and the mayor agreed that if the owner would not claim damages the city would make repairs on the portion of the building remaining, and the city contractor thereupon made the repairs so negligently that the building fell, it was held that the mayor had no authority to make such a contract, and the making repairs by the contractor was no evidence of ratification by the city. Sceery *v.* Springfield, 112 Mass. 512. So, where a committee were empowered to sell a school-house by vote of the district, a sale on credit instead of for cash was held to be void, and not ratified by lapse of time nor the removal of the school-house. School District *v.* Ætna Ins. Co., 62 Me. 330; Fitzpatrick *v.* School Commissioners, 7 Humph. 224. And in the case of corporations it has been held that where the directors make a contract, or undertake any action which is beyond the powers of the company itself, such act or contract is void, and cannot be ratified, even by the whole body of stockholders. Ashbury, &c. Co. *v.* Riche, L. R. 7 H. L. 653. Where, however, directors act irregularly, but within the powers of the company, the stockholders must either ratify or disaffirm their act without delay; as, where the directors allowed one of the stockholders to retire by giving up his stock, and thereby escape liability, it was held that a ratification could be inferred from the fact that the stockholders took no action in the matter. Evans *v.* Smallcombe, L. R. 3 H. L. 249; Spackman *v.* Evans, Ibid. 171; Houldworth *v.* Evans, Ibid. 263; Lane's Case, 1 De G. J. & S. 504; State of Wisconsin *v.* Torinus, 26 Minn. 1. And where an officer undertook without authority to appoint an appraiser for the creditors before levying upon the land of a debtor, it was held that the levy was void, and that his act was not ratified by creditors' acceptance of seisin. Richardson *v.* Payne, 114 Mass. 429. — Ed.]

[1] Wilkinson *v.* Leland, 2 Peters, 661, 662. In deeds of confirmation, the distinction turns upon the legal effect of the words, "ratify, approve, and confirm;" for if the words, "give and grant," be also in the deed, it will take effect, not as a confirmation, but as a grant. See Co. Litt. 295 *b*, 307 *a*. Lord Coke says: "A confirmation doth not strengthen a void estate; for a confirmation may make a voidable or defeasible estate good; but it cannot work upon an estate that is void in law." Co. Litt. 295 *b*; Com. Dig. *Confirmation*, D. 1.

priety to cases of contracts, and acts, which are illegal, or immoral, or against public policy; for, in such cases, the original contracts, or acts, being void, ought not to be allowed to acquire any validity from their being subsequently confirmed; since the same noxious qualities adhere to the ratification, as existed in the original transaction; and, therefore, the maxim may well be applied: "Quod ab initio non valet, tractu temporis non convalescit."[1]

§ 242. But, whatever may be the force of this distinction in the former class of cases (that is to say, in cases not illegal, immoral, or against public policy), when understood in its true meaning, and with its true limitations, it is not applicable to cases of agency, where a party assumes to act, not for himself, but for another, without any authority whatsoever, or by an excess of the authority delegated to him. In all such cases, if the principal subsequently ratifies the act, he is bound by it, whether it be for his detriment, or for his advantage; and whether it be founded upon a tort, or upon a contract.[2] And a ratification, once deliberately made, with a full knowledge of all the material circumstances, cannot be recalled.[3] Of course, this doctrine is to be understood with the qualification, that if the act of the agent be in the name of his principal, by an instrument under seal, without authority, the ratification must be under seal also; since (as we have seen) the principal is not bound by any act of his agent under seal, unless the authority of the principal has also been originally given to the agent under his seal.[4] A

[1] 1 Story on Equity Jurisp. § 307.

[2] 7 H. 4, p. 35, 4 Inst. 317; Hagedorn *v.* Oliverson, 2 M. & Selw. 485; Lucena *v.* Craufurd, 5 Bos. & Pull. 269; Routh *v.* Thompson, 13 East, 274; Wilson *v.* Poulter, 2 Str. 859; Taylor *v.* Plumer, 3 M. & Selw. 562, 580; Rogers *v.* Kneeland, 10 Wend. 218; Lench *v.* Lench, 10 Ves. 517; Kelly *v.* Munson, 7 Mass. 319. This point arose as long ago as in the Year Book, 7 Henry IV. p. 35. There a party justified, as bailiff, taking a heriot, for services due to the lord; and the issue was on the point, that he was not bailiff; and it was held, that if he took the heriot, claiming property therein for himself, the subsequent agreement of the lord would not amount to a ratification, making him bailiff at the time. But, if he took at the time, as bailiff of the lord, and not for himself, without command of the lord, yet the subsequent ratification made good his act, and made him bailiff at the time. The same point was held by Anderson, C. J., in Godbolt, 109, and was cited by Taddy, as counsel, and not denied in Hagedorn *v.* Oliverson, 2 M. & Selw. 487, 488. See also Moore *v.* Hussey, Hob. 227; Post, § 246, note.

[3] Post, § 250; [Breck *v.* Jones, 16 Texas, 461].

[4] Ante, § 49; Wells *v.* Evans, 20 Wend. 251; Blood *v.* Goodrich, 12 Wend. 525; Hunter *v.* Parker, 7 Mees. & Wels. 322, 343; Story on Partn. §§ 117–122; *Contra*, Cady *v.* Shepherd, 11 Pick. 400; Ante, § 49; Post, § 252; Skinner *v.*

ratification cannot, in this respect, stand upon a higher ground, than an original authority.[1]

§ 243. Hence it follows, that, if an agent has, by a deviation from his orders, or by any other misconduct, or omission of duty, become responsible to his principal for damages, he will be discharged therefrom by the ratification of his acts, or omissions, by the principal, if made with a full knowledge of all the facts and circumstances.[2] This latter is a most important qualification of the doctrine, and indispensable to its legal, as well as its equitable, operation.[3] For, if the ratification by the principal be without

Dayton, 19 Johns. 513; Gram *v.* Seton, 1 Hall, 262; Story on Partn. §§ 121, 122. [Where a crop lien was executed by an agent without authority from his principal in his absence, and under seal, the ratification by the principal must be in writing and under seal also. Pollard *v.* Gibbs, 55 Ga. 45. But the rule laid down in the text has been very much relaxed. Thus, where a deed is signed by A. in his own name and in his partner, B.'s, name, *held*, such signature could be ratified by B. by parol. Holbrook *v.* Chamberlin, 116 Mass. 155. And where an agent executed a mortgage in the name of his principal without authority, it was held that his principal, by taking possession of the land mortgaged, ratified the act of his agent, and could not deny the validity of the mortgage. Fouch *v.* Wilson, 59 Ind. 93. And in Grove *v.* Hodges, 55 Pa. St. 504, where a deed was signed for a party by his agent, not authorized to do so under seal, and the principal did not ratify the deed by an instrument under seal, the deed was held not to be his deed; but that if he accepted the proceeds, he was bound by it as if he had signed and sealed the deed, although the mode of enforcing the obligation was different. So, a person whose name was signed to a deed by his wife in his absence, ratifies the act and adopts the signature as his own by acknowledging the deed before a magistrate. Bartlett *v.* Drake, 100 Mass. 174. So, where an instrument which is unnecessarily under seal is executed by an agent without authority, it can be ratified by parol. State *v.* Spartanburg, &c. R. R. Co., 8 So. Car. 129; Merrifield *v.* Parritt, 11 Cush. 598. — Ed.]

[1] Ante, § 49; Blood *v.* Goodrich, 9 Wend. 68; s. c. 12 Wend. 525; Hanford *v.* McNair, 9 Wend. 54; Wells *v.* Evans, 20 Wend. 251; Hunter *v.* Parker, 7 Mees. & Wels. 322–345; Hibblewhite *v.* M'Morine, 6 Mees. & Wels. 200, 214, 215; Story on Partn. §§ 121, 122, note; McNaughton *v.* Partridge, 11 Ohio, 223. But see, *contra*, Cady *v.* Shepherd, 11 Pick. 400; Skinner *v.* Dayton, 19 John. 513; Gram *v.* Seton, 1 Hall, 262; Ante, § 49; Post, § 252; [Despatch Line *v.* Bellamy Manuf. Co., 12 N. H. 232].

[2] Smith *v.* Cologan, 2 T. R. 188, note; Towle *v.* Jackson, 1 John. Cas. 110; Codwise *v.* Hacker, 1 Cain. 526; Cairnes *v.* Bleecker, 12 John. 300; Owings *v.* Hull, 9 Peters, 607; Thorndike *v.* Godfrey, 3 Greenl. 429.

[3] [Thus, where agents received and retained a commission on reinsurance which should rightly have been paid over by them to their principal, it was held that acquiescence in their acts by the principal was a good defence to an action to recover such sums. Baring *v.* Stanton, L. R. 3 Ch. D. 502; Great Western Ins. Co. *v.* Cunliffe, L. R. 9 Ch. 525; and see Nixon *v.* Palmer, 4 Seld. 401; Farwell *v.* Meyer, 35 Ill. 41. — Ed.]

such knowledge, it will not be obligatory upon him, whether this want of knowledge arise from the designed, or the undesigned, concealment or misrepresentation of the agent, or from his mere innocent inadvertence.[1]

§ 244. A ratification, also, when fairly made, will have the same effect as an original authority has, to bind the principal, not only in regard to the agent himself, but in regard to third persons.[2] Therefore, a tortious act, done by an agent, which would, if authorized, give an action for damages to a third person against the principal, will, if subsequently ratified by the principal, give the same right to damages against him; as much so, as if the action were founded on a ratified contract of the agent.[3] In short, the act is treated throughout, as if it were originally authorized by the principal; for the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy;[4] or,

[1] See Copeland *v.* Merchants' Ins. Co. 6 Pick. 202, 204; Bell *v.* Cunningham, 3 Peters, 69, 81; Horsfall *v.* Fauntleroy, 10 B. & Cressw. 755; Owings *v.* Hull, 9 Peters, 607; Thorndike *v.* Godfrey, 3 Greenl. 429. Upon the same ground, in Horsfall *v.* Fauntleroy, 10 B. & Cressw. 755, Mr. Justice Parke held, that, where an agent has stated to his principal, and the latter has *bona fide* adopted, a contract, different from that under which the purchase was actually made, the seller cannot call upon the principal for payment; because the seller sues on the contract, under which the goods were really sold; and he is, therefore, bound to show, that the principal authorized, or ratified the contract, and not a different one, substituted by the agent.

[2] Smith on Merc. Law, 60 (2d ed.); Id. ch. 5, § 4, p. 108 (2d ed. 1843); Frothingham *v.* Haley, 3 Mass. 68, 70; Lent *v.* Padelford, 10 Mass. 230; McClean *v.* Dunn, 4 Bing. 722; Soames *v.* Spencer, 1 Dowl. & Ry. 32; Spittle *v.* Lavender, 2 Brod. & Bing. 452; Rogers *v.* Kneeland, 10 Wend. 218. How far, and when, a ratification by the principal of the unauthorized acts of his agent will operate to give him rights against third persons, we shall hereafter have occasion to consider. Post, § 245; Stainer *v.* Tysen, 3 Hill, 279; Marr *v.* Plumer, 3 Greenl. 73; Buchanan *v.* Upshaw, 1 Howard, Sup. Ct. 56; s. c. 17 Peters, 70.

[3] Rogers *v.* Kneeland, 10 Wend. 218.

[4] [Smethurst *v.* Taylor, 12 M. & W. 545. Thus, where a town surveyor certified that there was danger from a building owned by the plaintiff, and the town clerk issued directions to have the building taken down, which was done, and the expenses paid by the town were recovered from the plaintiff in a suit, it was held, in an action for damages brought by plaintiff, that the town had ratified and adopted the acts of its clerk and surveyor, and was liable in the action. Cheetham *v.* Mayor &c. of Manchester, L. R. 10 C. P. 249; see Touche *v.* Metropolitan &c. Co., L. R. 6 Ch. 671; Golson *v.* Ebert, 52 Mo. 260. But where the defendant owed the plaintiff, and a former agent of the defendant paid the plaintiff the amount of the debt, which the latter returned, and then sued the defendant for the debt, it was held, that after the

as the maxim above cited expresses it, "Omnis ratihabitio retrotrahitur." Hence it is, that, if the agent has made a contract without authority from his principal, or beyond his authority, and it is afterwards ratified, the principal may generally sue, and be sued thereon, in the same manner, and with the same effect, as if he had originally given the authority. Therefore, if a person, without authority, has made a purchase of goods for his principal, and has signed a bought note therefor, if the principal, after full knowledge of the transaction, ratifies it, that will make the signing a good signing within the statute of frauds, so as to bind both the parties to the contract.[1]

money had been paid back, it was too late for the defendant to ratify the first payment made by his former agent. Walter *v.* James, L. R. 6 Ex. 124. — Ed.]

[1] Maclean *v.* Dunn, 4 Bing. 722; Kinnitz *v.* Surry, cited Paley on Agency, by Lloyd, 171, note; Soames *v.* Spencer, 1 Dowl. & Ry. 32. Lord Chief Justice Best, in delivering the opinion of the court, in Maclean *v.* Dunn, 4 Bing. 722, said: "It has been argued, that the subsequent adoption of the contract by Dunn will not take this case out of the operation of the statute of frauds; and it has been insisted, that the agent should have his authority at the time the contract is entered into. If such had been the intention of the legislature, it would have been expressed more clearly. But the statute only requires some note or memorandum in writing, to be signed by the party to be charged, or his agent, thereunto lawfully authorized; leaving us to the rules of common law, as to the mode in which the agent is to receive his authority. Now, in all other cases, a subsequent sanction is considered the same thing in effect as assent at the time, Omnis ratihabitio retrotrahitur, et mandato æquiparatur. And, in my opinion, the subsequent sanction of a contract, signed by an agent, takes it out of the operation of the statute more satisfactorily than an authority given beforehand. Where the authority is given beforehand, the party must trust to his agent; if it be given subsequently to the contract, the party knows that all has been done according to his wishes. But in Kinnitz *v.* Surry, where the broker, who signed the broker's note upon a sale of corn, was the seller's agent, Lord Ellenborough held, that, if the buyer acted upon the note, that was such an adoption of his agency as made his note sufficient within the statute of frauds. And in Soames *v.* Spencer, where A. and B., being jointly interested in a quantity of oil, A. entered into a contract for the sale of it, without the authority or knowledge of B., who, upon receiving information of the circumstance, refused to be bound, but afterwards assented by parol, and samples were delivered to the vendees; it was held, in an action against the vendees, that B.'s subsequent ratification of the contract rendered it binding; and that it was to be considered as a contract in writing within the statute of frauds. That is an express decision on the point, that under the statute of frauds the ratification of the principal relates back to the time when the agent made the contract." [And where an agent of a State exceeded his authority in selling and delivering the property of the State, and in taking a note therefor, it was held that the legislature could ratify the act of its agent by act of legislature, and the State could then enforce payment on the note. State of Wisconsin *v.* Torinus, 26 Minn. 1. So, where such agent loaned the

In like manner, the agent will be entitled to the same rights and remedies, and to the same compensations, and will be subject to the same duties and responsibilities, as if he had been acting within the scope of an acknowledged original authority.[1]

§ 245. But, although the ratification of an unauthorized act of an agent, acting without any authority, or beyond his authority, will thus, in general, bind the principal, not only as to his agent, but as to third persons, and give the ordinary rights and remedies, both for and against him; yet this doctrine is to be received with some qualifications, or, rather, it is not universally applicable.[2] Where an act is beneficial to the principal, and does not create an immediate right to have some other act or duty performed by a third person, but amounts simply to the assertion of a right on the part of the principal, there the rule seems generally applicable. Thus, for example, if a continual claim, or an entry to avoid a fine, or an entry for condition broken, is made by a person having no present authority, the principal may bring an action upon any of these acts, and his ratification or adoption of them will supply the want of an original authority.[3]

§ 246. On the other hand, if the act done by such person would, if authorized, create a right to have some act or duty performed by a third person, so as to subject him to damages or losses, for the nonperformance of that act or duty, or would defeat a right or an estate already vested in the latter, there the subsequent ratification or adoption of the unauthorized act by the principal will not give validity to it, so as to bind such third person to the consequences. Thus, if a lease contains a condition, that it may be determined by either party upon six months' notice; such notice, given by an unauthorized person for the landlord, although subsequently ratified and adopted by the latter, will not be a valid notice to determine the lease.[4] The ground of this decision is, that it is a notice to defeat

school money of the State and took mortgages to secure such loans, it was held that the State could ratify his unauthorized acts and enforce the securities, not only against the mortgagors, but against subsequent purchasers. State *v.* Shaw, 28 Iowa, 67. And a person may ratify an action brought in his name, but without his knowledge or authority, by one assuming to act in his behalf. Ancona *v.* Marks, 7 H. & N. 686. — Ed.]

[1] Cornwall *v.* Wilson, 1 Ves. 509; Hopkins *v.* Mollinieux, 4 Wend. 465.

[2] Post, § 246.

[3] Co. Litt. 258 *a*; Fitchett *v.* Adams, 2 Strange, 1128; Goodtitle *v.* Woodward, 3 B. & Ald. 689. See below, note 1, p. 291.

[4] [Buron *v.* Denman, 2 Exch. 167.]

an estate, and the tenant is entitled to such notice as he can act upon with certainty at the time when he receives it, so that he may deliver up the possession at the end of the six months, without being liable to further claims in respect to the remainder of the term.[1] The case is distinguishable from that of an entry without authority, for a condition broken; because, in the latter case, the third person's act is not to depend upon the validity of the entry at the time when it is made. The rule, "omnis ratihabitio retrotrahitur, et mandato priori æquiparatur," seems applicable only to cases, where the conduct of the parties, on whom it is to operate, not being referable to any agreement, cannot, in the mean time, depend on the fact, whether there be a ratification or not.[2]

§ 247. Upon similar grounds a demand upon a debtor, and refusal by him to pay a debt made by an unauthorized agent, will not take away the right of the debtor to plead a prior tender of the debt to the principal; for, as the agent had no authority to make the demand, payment to him would not have discharged the debtor from the debt. The subsequent adoption of the act by the principal would not vary the right of the debtor in such a case, since he could not safely pay to one who was without authority at the time to receive

[1] Right d. Fisher *v.* Cuthell, 5 East, 491; Doe d. Mann *v.* Walters, 10 B. & Cressw. 626. The same point was expressly held in Doe d. Lyster *v.* Goldwin, 2 Adolph. & Ellis, New R. 143.

[2] Right d. Fisher *v.* Cuthell, 5 East, 498–500; Doe d. Mann *v.* Walters, 10 B. & Cressw. 626; s. p. Doe d. Lyster *v.* Goldwin, 2 Adolph. & Ellis, New R. 143. The cases on this subject are not entirely in harmony with each other. Thus, in Roe *v.* Pierce, 2 Camp. 96, a verbal notice to quit, by a steward of a corporation, was held ratified and binding by the corporation's bringing a suit, founded upon that notice. And in Goodtitle *v.* Woodward, 3 B. & Ald. 689, a notice to quit, given by an agent for several trustees jointly interested, but acting by a written authority, signed by some only of the trustees, was held good, by the adoption of all the trustees, by bringing a suit thereon. And the court held, that the maxim, Omnis ratihabitio retrotrahitur, applied to the case. This last case may, however, be now supported on another distinct ground, that the notice by some of the trustees was good originally for all. Doe *v.* Summersett, 1 B. & Adolph. 135. But the ground of the decision, as stated in 3 B. & Ald. 689, is certainly inconsistent with the cases of Right *v.* Cuthell, 5 East, 491, and Doe *v.* Walters, 10 B. & Cressw. 626, and Doe d. Lyster *v.* Goldwin, 2 Adolph. & Ellis, New R. 143. See Mr. Lloyd's note to Paley on Agency, by Lloyd, 190, note (*c*). It must be admitted, that the distinction between the effect of a ratification enforcing the right of a principal, as, for example, an entry to avoid a fine, or for condition broken, and the effect of a ratification in a case where the other party is to do some act, or to suffer some loss thereby, is one of considerable nicety, and stands upon reasoning not very satisfactory or very clear. See Ante, § 242, note.

the money and to give a discharge.[1] So, a demand of goods, made by an unauthorized person, will not, although subsequently adopted by the principal, be evidence to support an action of trover for a conversion against the party in whose possession the goods were, and of whom they were demanded.[2] So, a demand made by a person not authorized, of payment of a promissory note or of a bill of exchange, will not, even though afterwards ratified by the holder, constitute a good demand upon the party, so as to make him liable for damages for his default in payment.[3] So, notice of the dishonor of a promissory note, or of a bill of exchange, by a mere stranger, not a party to the same bill, or authorized thereto, will not be a good notice to bind an indorser or drawer.[4] So, also, where A. does an act as agent for B., without any communication with C., C. cannot, by afterwards adopting that act, make A. his agent, and thereby incur any liability, or take any benefit under the act of A.[5] Let us now return to the effect of a ratification by the principal in ordinary cases.

§ 248. As, from what has been already said, the principal thus acquires a right to elect whether he will adopt the unauthorized act or not, it must be admitted, that the parties do not generally stand upon equal terms; since the principal may always elect to ratify the act, if it is for his benefit, and to disavow it, if it is to his injury. But this consequence has never been allowed to overcome the force of the general doctrine. Thus, for example, where an unauthorized agent procured an insurance to be made upon a certain ship for the benefit of the owner thereof; and the ship was lost during the voyage; and long after the loss the owner ratified the insurance, and a suit was brought against the underwriters; it was held to be no objection to the recovery, that the ratification was not until long

[1] Coore *v.* Callaway, 1 Esp. 115; Coles *v.* Bell, 1 Camp. 478, note.

[2] Solomons *v.* Dawes, 1 Esp. 83.

[3] Freeman *v.* Boynton, 7 Mass. 483; Bank of Utica *v.* Smith, 18 John. 230; Chitty on Bills, ch. 9, p. 398 (8th ed. 1833).

[4] Tindal *v.* Brown, 1 T. R. 167; Stanton *v.* Blossom, 14 Mass. 116; Stewart *v.* Kennet, 2 Camp. 177; *Ex parte* Barclay, 7 Ves. 597; Chitty on Bills, ch. 8, p. 368 (8th ed. 1833); Story on Bills of Exchange, §§ 303, 304.

[5] Wilson *v.* Tumman, 6 Mann. & Gr. 236. [Where A. agrees to furnish B. with lumber, which he buys of C., representing himself but without authority as the agent of B., and lumber is shipped to B. in instalments, a bill from C. to B. being sent with each lot, and B. receives the same without notifying C. that he was purchasing of A., he is liable to C. for the same. Bearce *v.* Bowker, 115 Mass. 129. He would not be liable in such case if he received the goods as the property of A. Carson *v.* Cummings, 69 Mo. 325; Watson *v.* Swann, 11 C. B. N. S. 756. — ED.]

after the loss, and that the owner would not have been bound to pay the premium, if the ship had safely arrived. For the agent had still a right to effect the insurance, and to take the chance of its being adopted; and he could not have recovered back the premium paid by him to the underwriters, upon the ground that he had no authority, and that, therefore, there was no interest insured; because the underwriters would have borne the risk, until there had been a disavowal by the principal.[1]

§ 249. And not only will the principal be bound by a ratification of the unauthorized act of his agent, but, if the latter has improperly substituted another agent under him, the ratification by the principal of the acts of the sub-agent will, to all intents and purposes, bind him, in the same manner, as if he had originally given to the agent a power of substitution.[2] The Roman law recognized the same doctrine. "Sed et in ipsum procuratorem, si omnium rerum procurator est, dari debebit institoria. Sed et si quis, meam rem gerens, præposuerit, et ratum habuero, idem erit dicendum.[3] (Id est, dari debebit institoria actio.)"

§ 250. Another consideration, very important in cases of this sort, is, that the principal cannot, of his own mere authority, ratify a transaction in part, and repudiate it as to the rest. He must either adopt the whole or none.[4] And hence the general rule is deduced,

[1] Hagedorn *v.* Oliverson, 2 M. & Selw. 485; Routh *v.* Thompson, 13 East, 279. See also Emerigon. Tome 1, ch. 5, § 6, pp. 142–146; 3 Kent, Comm. Lect. 48, pp. 260, 261 (4th ed.); 1 Phillips on Ins. ch. 22, p. 519; 2 Phillips on Ins. ch. 22, pp. 357–359; Barlow *v.* Leckie, 4 J. B. Moore, 8; [Williams *v.* No. China Ins. Co. L. R. 1 C. P. D. 757; Francis *v.* Kerker, 85 Ill. 190].

[2] Blore *v.* Sutton, 3 Meriv. 246; Soames *v.* Spencer, 1 Dowl. & Ry. 32; Henderson *v.* Barnwall, 1 Y. & Jerv. 387; Kinnitz *v.* Surry, cited Paley on Agency, by Lloyd, 171, note; Smith *v.* Cologan, 2 T. R. 188, n.; 3 Chitty on Com. & Manuf. 206; Coles *v.* Trecothick, 9 Ves. 236, 251, 252. [Where A., without the consent of his principal, authorized B. to receive money belonging to his principal, the latter can ratify this action of A., and hold him responsible for the amount collected by his agent B. Strickland *v.* Hudson, 55 Miss. 255. But the employment of a sub-agent, and the principal's knowledge thereof and acceptance of his services as beneficial, creates no liability on the part of the principal to pay for such services. Homan *v.* Brooklyn Life Ins. Co., 7 Mo. App. 22; and see Grace *v.* Am. Centr. Ins. Co., 16 Blatch. C. C. 433. And where sub-contractors have no authority to pledge the credit of the contractor, the fact that the latter has already paid a similar account will not create any liability on his part to pay a subsequent bill incurred without his authority without other acts of ratification. Danaher *v.* Garlock, 33 Mich. 295. — Ed.]

[3] Dig. Lib. 14, tit. 3, l. 6, 7; Pothier, Pand. Lib. 14, tit. 3, n. 18.

[4] Smith on Merc. Law, 60 (3d ed.); Id. ch. 5, § 4, p. 108 (3d ed. 1843); Wilson *v.* Pulter, 2 Str. 859; Billon *v.* Hyde, 1 Atk. 126; Smith *v.* Hodson,

that, where a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent.[1] It may be added, that a ratification, once deliberately made, upon full knowledge of all the material circumstances, becomes, *eo instanti*, obligatory, and cannot afterwards be revoked or recalled.[2]

§ 251. Where a contract, which has been originally made by an agent without authority, is afterwards ratified by the principal, that ratification will, in general, relieve the agent from all responsibility on the contract, if it purports to be executed by him merely as an agent, although without such ratification he would be liable to the other contracting party for his misrepresentation or mistake of authority. Thus, if a person should in his own name, but in the character of agent of the owner, sign a written agreement for the sale of an estate, without any authority from the owner, and the latter should afterwards sign the same agreement, and declare thereon, that he sanctioned and approved of the agent's having signed it in his behalf, the agent will no longer be personally liable on the contract; but his principal only will be liable, even although the agent, without such ratification, might have been liable thereon.[3]

4 T. R. 211; Hovil *v.* Pack, 7 East, 164; Findley *v.* Breedlove, 16 Martin, 105; 3 Chitty on Com. & Manuf. 197, 198; Cornwall *v.* Wilson, 1 Ves. 509; Newall *v.* Hurlbert, 2 Vt. 351; [Benedict *v.* Smith, 10 Paige, 126; Farmers' Loan & Trust Co. *v.* Walworth, 1 Comst. (N. Y.) 433; Menkens *v.* Watson, 27 Mo. 163].

[1] Ibid.; Ferguson *v.* Carrington, 9 B. & Cressw. 59; Corning *v.* Southland, 3 Hill, 552. [So a debtor cannot have the benefit of a compromise and release effected by his agent with his creditors, without adopting all the representations made by the agent to the creditors in negotiating the same. Crans *v.* Hunter, 28 N. Y. 389; Southern Express Co. *v.* Palmer, 48 Ga. 85; Attwood *v.* Small, 6 Cl. & F. 232; Menkens *v.* Watson, 27 Mo. 163; Krider *v.* Trustees of Western College, 31 Iowa, 547. And the principal cannot ratify an act of the agent in a doubtful manner, as "if he received no harm thereby," but he must repudiate the whole agency or he will be bound by the acts of the agent in his behalf. Fort *v.* Coker, 11 Heisk. 579. And where A. stored corn with B., who sold it without authority, but handed all the purchase-money to A., except the amount due for one lot sold to C., of which A. was not informed, and A. accepted the money, it was held that he had ratified all the sales including that made to C. Seago *v.* Martin, 6 Heisk. 308; Burgess *v.* Harris, 47 Vt. 322. Where an agent to loan money takes insufficient security, the principal is not bound to accept and discharge the agent, or to reject the security and look only to the responsibility of the agent. He may keep the security and hold the agent bound for any deficiency. Bank of Owensboro' *v.* Western Bank, 13 Bush (Ky.), 526. — Ed.]

[2] 3 Chitty on Com. & Manuf. 197, 198; Smith *v.* Cologan, 2 T. R. 188, note; Clarke's Executors *v.* Van Reimsdyk, 9 Cranch, 153; Ante, § 242.

[3] Spittle *v.* Lavender, 2 Brod. & Bing. 452; Post, § 278, note. See Collins

§ 251 *a*. One other consideration is important to be borne in mind. It is that a ratification can only be effectual between the parties, when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent himself, or of some third person. This would seem to be an obvious deduction from the very nature of a ratification, which presupposes the act to be done for another, but without competent authority from him; and therefore gives the same effect to the act as if it had been done by the authority of the party for whom it purported to have been done and as his own act. Hence it has been laid down as a maxim of the canon law, "Ratum quis habere non potest, quod ipsius nomine non est gestum."[1] The same rule was early recognized in the common law, and has been recently explained in a most satisfactory manner.[2]

v. Butts, 10 Wend. 399. Whether a person who has signed an instrument, as agent, but without authority, will be responsible, either on the instrument itself, or by a special action on the case to the other party, if his principal afterwards ratifies his act, has been a matter of some diversity of judicial opinion. In Ballou *v.* Talbot, 16 Mass. 461, the Supreme Court of Massachusetts held incidentally, that he will not be liable after such a ratification. In Rossiter *v.* Rossiter, 8 Wend. 494, the Supreme Court of New York intimated a different opinion. Upon principle, it would seem, that the ratification will make the instrument binding on the principal, in the same manner and to the same extent, as if he had originally authorized it; and, of course, the agent will not, under such circumstances, render himself personally liable, unless by the form of the instrument, he has included a personal liability. Post, § 264, note; [Roby *v.* Cossitt, 78 Ill. 638; Bray *v.* Gunn, 53 Ga. 144; Lucas *v.* Barrett, 1 Greene (Iowa), 511; Palmer *v.* Stephens, 1 Denio, 472].

[1] See the learned note of the Reporter to the case of Wilson *v.* Tumman, 6 Mann. & Gr. 239, note (*a*); [Watson *v.* Swan, 11 C. B. N. S. 756; Ancona *v.* Marks, 7 H. & N. 686].

[2] Wilson *v.* Tumman, 6 Mann. & Gr. 236. On this occasion, Lord Chief Justice Tindal said: "That an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority. Such was the precise distinction taken in the Year-Book, 7 Hen. IV., fo. 35, — that if the bailiff took the heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority, as bailiff at the time; but if he took it, at the time, as bailiff of the lord, the subsequent ratification by the lord made him bailiff at the time. The same distinction is also laid down by Anderson, C. J., in Godbolt's Reports, 109. 'If one have cause to distrain my goods, and a stranger, of his own wrong, without any warrant or authority given him by the other,

§ 252. Having stated the general nature and effect of a ratification, it remains to consider what acts of the principal will amount to a ratification. Whenever there is an express assent to, or an express confirmation of, the transaction, there can be but little difficulty in applying the doctrine. If the act of the agent purports to be under seal, and in the name of the principal, so as to be his deed, the ratification also must, as we have seen, be by an instrument under seal.[1] But, in other cases, however informal the instrument may be in its structure and language, if it can be gathered from the contents that an express ratification is intended, that will suffice.

§ 253. But by far the largest class of cases of ratifications of unsealed contracts arises by implication from the acts and proceedings of the principal *in pais;* for it is by no means necessary, that there should be any positive or direct confirmation.[2] And, for this purpose, the acts and conduct of the principal are construed liberally in favor of the agent.[3] Where the evidence is doubtful, and may admit of different interpretations, there it seems proper to submit the question for the decision of the jury. But, where they can justly lead to no safe or satisfactory conclusion, a ratification

takes my goods, not as bailiff or servant to the other, and I bring an action of trespass against him, can he excuse himself by saying that he did it as his bailiff or servant? can he also father his misdemeanor upon another? He cannot; for once he was a trespasser, and his intent was manifest.' "

[1] Ante, §§ 49, 242; Blood *v.* Goodrich, 9 Wend. 68; s. c. 12 Wend. 565; Hanford *v.* M'Nair, 9 Wend. 57. But see, *contra*, McNaughten *v.* Partridge, 11 Ohio, 223; Cady *v.* Shepherd, 11 Pick. 400; Ante, §§ 49, 51, 125, 242; Story on Partn. § 122, note; [Fitzgerald *v.* Dressler, 7 C. B. N. S. 374].

[2] 3 Chitty on Com. & Manuf. 197, 198. [Thus, where the general agent of B.'s property signed a warrant to distrain C.'s goods for arrears of rent, and after the goods had been distrained, B. said he "should leave matters in the agent's hands," it was held that this was sufficient evidence of a ratification of the agent's acts. Haseler *v.* Lemoyne, 5 C. B. N. S. 530. So, where an agent exceeded his authority, and his principal wrote, "I left everything to him (the agent), desiring him to do the best he could. Of course I must support him in all he has done for me, except incivility;" this was held to be a full ratification. Fitzmaurice *v.* Bayley, 6 El. & Bl. 868. So, where a husband, to secure a debt of his own, mortgaged his wife's property, and when the mortgagee threatened to foreclose in the presence of the wife, and demanded more security, the wife said, "What more do you want, you have a mortgage on all the personal property already?" it was held that this was a ratification of her husband's act in giving the mortgage. Merrill *v.* Parker, 112 Mass. 250. See also Lovejoy *v.* Middlesex R. R. Co., 128 Mass. 480; Hawkins *v.* Lange, 22 Minn. 557. — ED.]

[3] Terril *v.* Flower, 6 Martin, 584; Codwise *v.* Hacker, 1 Caines, 526; Loraine *v.* Cartwright, 3 Wash. Cir. 151; [Bryne *v.* Doughty, 13 Ga. 46].

ought not to be presumed.[1] Slight circumstances and small matters will sometimes suffice to raise the presumption of a ratification.[2] But whenever the acts and conduct of the principal are inconsistent with any other supposition, the presumption of a ratification becomes, of course, far more violent and conclusive. Thus, for example, if an agent who is employed to purchase goods at a limited price should exceed that limit, and the principal, after full knowledge of the facts, should receive them on his own account, without objection, it would be presumed that he intended to ratify the transaction.[3] And, *à fortiori*, if the principal should not only receive, but should sell, them on his own account.[4] The same conclusion would arise, under similar circumstances, if the agent had no authority whatsoever to make any purchase. So, if an agent should sell goods contrary to his instructions, and the principal should afterwards receive the proceeds without objection, it would

[1] See Penn., &c., Steam Navigation Co. *v.* Dandridge, 8 Gill & John. 248; Horton *v.* Townes, 6 Leigh (Va.), 47; [Crooker *v.* Appleton, 25 Me. 131; Barnard *v.* Wheeler, 24 Me. 412; Bryant *v.* Moore, 26 Me. 84].

[2] 3 Chitty on Com. & Manuf. 197, 198; Ward *v.* Evans, Salk. 442; s. c. 2 Ld. Raym. 928; Thorold *v.* Smith, 11 Mod. 87; Conn *v.* Penn, 1 Pet. Cir. 496; Loraine *v.* Cartwright, 3 Wash. Cir. 151; Richmond Manufacturing Co. *v.* Starks, 4 Mason, 296; Bank of Columbia *v.* Paterson's Adm'rs, 7 Cranch, 299; Terril *v.* Flower, 6 Martin, 584; Rogers *v.* Kneeland, 13 Wend. 114; Codwise *v.* Hacker, 1 Caines, 526. [Thus, where a principal, on being informed of a purchase by his agent, did not deny the agent's authority, but merely complained of the manner in which he had made the purchase, he was held to have admitted the right of the agent to bind him. Johnson *v.* Jones, 4 Barb. 369; Cooper *v.* Schwartz, 40 Wisc. 54. And where the parties named in a submission to arbitration, which was signed by their attorneys, appeared and testified as witnesses, it was held that such action was a sufficient ratification by them of the submission. Blakely *v.* Graham, 111 Mass. 8. So, where the directors of a company, who were not at liberty to purchase shares without the sanction of the stockholders, purchased such shares without the permission of the stockholders, it was held that such sanction could be inferred from the conduct of the company, and could be obtained at any time before the transaction was completed. Lane's case, 1 De G. J. & S. 504. — Ed.]

[3] Odiorne *v.* Maxcy, 13 Mass. 178; Clark's Ex'rs *v.* Van Reimsdyk, 9 Cranch, 153. [Where the superintendent of the defendant corporation bought goods to carry on its business, with the knowledge of all the officers and stockholders, except one, and he was afterwards informed of it and did not object, it was held that there was sufficient evidence of a ratification of the purchase by the corporation. Lyndeborough Glass Co. *v.* Mass. Glass Co., 111 Mass. 315. So, where one in a subordinate capacity under a mining company leased a right to mine in a certain range, and the company accepted the rents therefrom, they were held to have ratified the unauthorized act of their agent. Chamberlin *v.* Collinson, 45 Iowa, 429; Chamberlin *v.* Robertson, 31 Iowa, 408. — Ed.]

[4] See Willinks *v.* Hollingsworth, 6 Wheat. 241, 259.

amount to a ratification of the sale.[1] So, if a person should sign or indorse a note, as agent for another, without authority, and the principal should afterwards, upon a full knowledge, promise to pay it accordingly, that would amount to a ratification of the act.[2]

[1] Forrestier *v.* Bordman, 1 Story, 43. [Thus, a release of a mortgage by an agent for his principal, the latter having accepted the consideration with knowledge of the release, was held binding on the principal, though the agent exceeded his authority. Tooker *v.* Sloan, 30 N. J. Eq. 394. And where an agent, acting under a general authority from his principal to make the sale, sold to another party two mules, and the principal subsequently ratified the sale by accepting from the agent the note given for the purchase-money, it was held that the principal was bound by a warranty of the agent as to the soundness of the mules. Cochrane *v.* Chitwood, 59 Ill. 53; Eadie *v.* Ashbaugh, 44 Iowa, 519. And where an agent had sold notes and afterwards settled with his principal, who had knowledge of the agent's acts before the settlement, it was held that taking the agent's note amounted to a ratification of the sale. Turner *v.* Wilcox, 54 Ga. 593. And where a principal, knowing that his agent had disobeyed his instructions, received an account of sales and made a settlement with the agent by giving him notes for the balance due him, he cannot in a suit on the notes set up as a defence the fact that the agent had disobeyed him. Beall *v.* January, 62 Mo. 434. See also Ely *v.* James, 123 Mass. 36; Churchill *v.* Palmer, 115 Mass. 310; Harris *v.* Simmerman, 81 Ill. 413; Palmerton *v.* Huxford, 4 Denio, 166; Robinson *v.* Mut. Ben. Life Ins. Co., 16 Blatch. C. C. 194. — Ed.]

[2] Fenn *v.* Harrison, 4 T. R. 177; Long *v.* Colburn, 11 Mass. 97; [Dow *v.* Spenny, 29 Mo. 386; Commercial Bank *v.* Warren, 15 N. Y. 577. And where A. made B. her attorney to execute all papers for her, sign notes, &c., while she was in Europe, and after her return he made several such notes for her, which she paid, and in one case signing an agreement of composition on one such note, it was held that these facts were sufficient evidence of ratification. Harrod *v.* McDaniels, 126 Mass. 413. If an agent without authority borrows money in the name of his principal, and the latter, after receiving the proceeds, when payment is demanded, fails within a reasonable time to disavow the act of his agent, he is held to have ratified it and to be bound by the notes. Gold Mining Co. *v.* National Bank, 96 U. S. 640. So, where an agent of an insurance company procured a policy for B., and paid the premium, and gave a premium note in the name of B., and this fact was written in the policy, but B. did not read over the policy nor learn that the note had been given in his name by the agent, it was held that the acceptance of the policy was a ratification of the agent's act, and B. was bound on the note. Monitor Mut. Fire Ins. Co. *v.* Buffum, 115 Mass. 343. So, where a cashier of a bank borrowed money on a note for a bank, and the directors received and used the proceeds, and the note was renewed and interest paid on it by the bank, it was held that the bank had ratified the act of the cashier in making the note. Ballston Spa Bank *v.* Marine Bank, 16 Wisc. 120. And where the president of a corporation sold property belonging to the company to pay a debt due from the company, which sale was in fact unauthorized, but after it was communicated to the board of directors they did nothing to disaffirm it, the sale was held to have been ratified. Walworth &c. Bank *v.* Farmers & Co., 16 Wisc. 629; National Bank *v.* Fassett, 42 Vt. 432; Watson *v.* Gray, 4 Abb. App. Cas. 540; Perkins *v.* Boothby, 71 Me. 91. — Ed.]

§ 254. So, if a party should receive a note for collection, and should improperly convert it to his own use, and afterwards the principal, upon notice of all the facts, should take the agent's own note for the amount, he would be bound thereby; and he could not afterwards recover the money from a third person, to whom the converted note had been paid.[1] So, if a person should, without authority, make a contract to borrow money for a corporation, and the money should be applied to the benefit of the corporation, which should afterwards recognize it as a debt, by paying interest thereon, and passing accounts relative thereto, it would amount to a ratification of the borrowing of the money on the part of the corporation.[2]

§ 255. Long acquiescence, also, without objection, and even the silence of the principal, will, in many cases, amount to a conclusive presumption of the ratification of an unauthorized act; especially where such acquiescence is otherwise not to be accounted for, or such silence is either contrary to the duty of the principal, or it has a tendency to mislead the agent.[3] Thus, for example, if an agent, with-

[1] Cushman *v.* Loker, 2 Mass. 106.

[2] Episcopal Charity Society *v.* Episcopal Church in Dedham, 1 Pick. 372. [So, where a lease of land was made in the agent's name but the land was occupied by the corporation, it was held that the action of the corporation was a ratification of the agent's action. Clark *v.* Gordon, 121 Mass. 330. And so where the secretary of an insurance company pledged bonds of the company with the knowledge and acquiescence of the directors. Darst *v.* Gale, 83 Ill. 136; Durham *v.* Carbon Coal Co., 22 Kans. 232; Despatch Line *v.* Bellamy Manuf. Co., 12 N. H. 237. So, where goods were purchased by the president of a gas company, and they were used in the construction of the gas works, in an action to enforce a mechanics' lien for the materials furnished, the gas company claimed that the president had no authority to make the purchase, because the directors had not given him authority, it was held that the company were liable, as they had used the goods. Brown *v.* Lacrosse City Gas Co., 21 Wisc. 51. — Ed.]

[3] Courcier *v.* Ritter, 4 Wash. Cir. 549; Erick *v.* Johnson, 6 Mass. 193; Amory *v.* Hamilton, 17 Mass. 103; Towle *v.* Stevenson, 1 John. Cas. 110; Armstrong *v.* Gilchrist, 2 John. Cas. 424; Pitts *v.* Shubert, 11 La. 288; Kingston *v.* Kincaid, 1 Wash. Cir. 454; Forrestier *v.* Bordman, 1 Story, 43; Ante, § 90. [An attorney has no right to receive a bond in settlement of a debt due to his principal; but if he does, a ratification of the act will be inferred from his principal's acquiescence therein; and even his principal's silence may raise a conclusive presumption of ratification, especially where it has a tendency to mislead the attorney. Maddux *v.* Beavan, 39 Md. 485. In Bosseau *v.* O'Brien, 4 Biss. 395, however, it was held that the failure of the principal to answer letters or inquiries from the agent as to the completion of the sale was not a ratification. See also Norris *v.* Cook, 1 Curtis, 461; Owsley *v.* Woolhopter, 14 Ga. 124; Wright *v.* Boynton, 37 N. H. 9; Hazard *v.* Spears, 2 Abb. Ap. Cases, 353; Kelsey *v.* National Bank of Crawford, 69 Pa. St. 426. — Ed.]

out authority, should compromise a debt of his principal, who, after knowledge of the fact, should make no objection, but acquiesce for a length of time in the act, he would be held bound by it.[1]

§ 256. Where an agency actually exists, the mere acquiescence of the principal may well give rise to the presumption of an intentional ratification of the act.[2] The presumption is far less strong,

[1] Armstrong *v.* Gilchrist, 2 Johns. Cas. 424. [So, where an agent to collect a debt took in payment bills of a bank of unknown solvency, with the guaranty of the debtor that the bills were good, and the principal received the bills and guaranty, and was informed of the facts, and said he would see what could be done with the bills, which he kept two or three months before he ascertained their value, and then he found they were worth only twenty cents on the dollar; it was held that the principal, by his delay and acquiescence, had ratified the agent's acts. Pickett *v.* Pierson, 17 Vt. 470. Where the owner of land had for a great lapse of time neglected to look after either the land or its proceeds, and it appeared that an attorney, with a power of attorney to sell, had sold the land for his own use, it was held that his heirs could not set aside the conveyance, Hammond *v.* Hough, 52 Tex. 63; Crane *v.* Bedwell, 25 Miss. 507; Abbe *v.* Rood, 6 McLean, 109: and where an agent sells his principal's goods to his own firm, the principal is held to have ratified the sale if he acquiesces in it for a great length of time, Francis *v.* Kerker, 85 Ill. 190: and where the directors of a corporation allowed a shareholder to escape liability by giving up his shares, the other shareholders, if they do nothing in the matter, are held to have ratified the action of the directors, though the latter had no authority to take such a step, Evans *v.* Smallcombe, L. R. 3 H. L. 249; Spackman *v.* Evans, Ibid. 171; Houldworth *v.* Evans, Ibid. 263: but where a party receives a banker's account, and quietly acquiesces in it for a time, in ignorance of the facts, this is not a ratification of the account, and he can afterwards dispute it, Follansbee *v.* Parker, 70 Ill. 11; and see Nixon *v.* Brown, 57 N. H. 34; Searing *v.* Butler, 69 Ill. 575; Robinson *v.* Gleadow, 2 Bing. (N. C.) 156. — Ed.]

[2] Courcier *v.* Ritter, 4 Wash. Cir. 549; Amory *v.* Hamilton, 17 Mass. 103; Erick *v.* Johnson, 6 Mass. 193. [The mere failure to disavow the acts of an unauthorized agent instantly upon learning them, is not a ratification of them by the principal. Miller *v.* Excelsior Stone Co., 1 Ill. App. 273; but where the principal wishes to repudiate the acts of an unauthorized agent, he must do so "within a reasonable time," or as soon thereafter as he can, Peck *v.* Ritchey, 66 Mo. 114: and if he does not he will be bound by them, Western & Atlantic R. R. Co. *v.* McElwee, 6 Heisk. 208; Walker *v.* Walker, 7 Baxter, 260; Law *v.* Cross, 1 Black, U. S. 533: and the mere receipt of a portion of the money realized from the sale of property improperly sold by the sheriff will not be construed to be a ratification of the sale, Harris *v.* Miner, 28 Ill. 135; Doughady *v.* Crowell, 3 Stock. (N. J.) 201; Fitzsimmons *v.* Joslin, 21 Vt. 129; Johnson *v.* Jones, 4 Barb. 369: but it has been held that where an agent has a special and limited authority to sell his principal's property, and sells it in violation of his instructions, the principal is under no obligation to notify the purchaser of the fact, and his omission to do so will not ordinarily be a ratification of the sale. White *v.* Langdon, 30 Vt. 599. This is not the generally accepted rule of law, however. In Ward *v.* Williams, 26 Ill. 447, it was held that the unauthorized act of a stranger will not be binding unless expressly ratified; and a wife's silence

and the mere fact of acquiescence may be deemed far less cogent, where no such relation of agency exists at the time between the parties. However, if there are peculiar relations of a different sort between the parties, such as that of father and son, the presumption of a ratification will become more vehement, and the duty of disavowal on the part of the principal more urgent, when the facts are brought to his knowledge.

§ 257. The Roman law, which upon this subject seems to have proceeded upon the same principles as our law, puts the case of a son, who should borrow money in the absence of his father, as if by the authority of the father, and should write to him to pay the money to the lender; and it declares, that, if the father does not approve of the loan, he ought immediately to make known his dissent to the lender, otherwise he will be deemed tacitly to have ratified it.[1] *A fortiori*, the father will be deemed to have ratified the act of borrowing, if he has commenced paying the debt. "Hoc amplius cessabit Senatûs-consultum, si pater solvere cæpit, quod filius familias mutuum sumpserit, quasi ratum habuerit."[2]

was held no ratification where her husband forged a deed of her property and delivered it without her knowledge. Ladd *v.* Hildebrant, 27 Wisc. 135. — Ed.]

[1] Dig. Lib. 14, tit. 6, l. 16; Pothier, Pand. Lib. 14, tit. 6, n. 6; 1 Liverm. on Agency, 48, 49 (ed. 1818). The passage is from Paulus, and is as follows: Si Filius familias, absente patre, quasi ex mandato ejus pecuniam acceperit, cavisset, et ad Patrem literas emisit, ut eam pecuniam in provinciâ solveret; debet Pater, si actum filii sui improbat, continuo testationem interponere contrariæ voluntatis. Dig. Lib. 14, tit. 6, l. 16. Pothier adds: Alioquin videtur tacite ratum habere. Pothier, Pand. Lib. 14, tit. 6, n. 6, n. The cases cited in the text, as put in the Roman law, arose under the Macedonian Decree (so called), made to prevent young heirs from running into extravagance, by secretly borrowing money during the lives of their fathers; upon a similar policy to that which governs in our law in relation to post-obit bonds. But still they illustrate the general principle. The near relationship between the parties in such cases furnishes a presumption of approbation unless there is a dissent. Emerig. sur Assur. Tom. 2, ch. 5, § 6, n. 2, pp. 144, 145. Gothodfredus, in his commentary on the text of the Digest, says, Literas qui recipit conjunctionis favore, presumitur probare ea omnia, quæ in literis comprehensa sunt, nisi continuo, seu illico, contradicat. Gothodfred. ad Senatus Consul. Maced. Dig. Lib. 14, tit. 6, l. 16. Cujacius puts the case expressly upon the ground of an implied ratification, from the silence of the father. Verum, non tam epistola ipsa habetur pro ratihabitione, quam tacitus concensus patris accipientis epistolam missam a filio, qui certe pro ratihabitione est. Cujac. ad L. 59, penult. ff. mandati (Dig. Lib. 17, tit. 1, l. 59, § 5); Cujacii Opera, Tom. 6, col. 530, E; Cujac. ad L. 6, ff. ad Sen. Consult. Maced. (Dig. Lib. 14, tit. 6, l. 16); Cujac. Opera, Tom. 6, col. 526, E; 1 Emerig. Assur. ch. 5, § 6, p. 145.

[2] Pothier, Pand. Lib. 14, tit. 6, n. 6; Dig. Lib. 14, tit. 6, l. 7, § 15.

§ 258. In respect to silence, whether it operates as a presumptive proof of ratification, may essentially depend upon the particular relations between the parties, and the habits of business, and the usages of trade. In the ordinary course of business between merchants and their correspondents, it is understood to be the duty of the one party, receiving a letter from the other, to answer the same within a reasonable time; and if he does not, it is presumed that he admits the propriety of the acts of his correspondent, and confirms and adopts them. This presumption seems now, in favor of commerce, to be universally acted upon. And, therefore, if the principal having received information, by a letter from his agent, of his acts, touching the business of his principal, does not, within a reasonable time, express his dissent to the agent, he is deemed to approve his acts, and his silence amounts to a ratification of them.[1] Nor is this a principle peculiar to our jurisprudence. It has received the sanction of the Roman law;[2] and has also been fully recognized by modern commercial jurists on the continent of Europe.[3] Even if no such prior relation of principal and agent has existed between the parties, yet, if a party, who has acted for another, gives notice thereof to the principal, and the latter makes no reply, or no objection, it will, in many cases, afford a presumption, that he ratifies the act.[4]

[1] Prince *v.* Clarke, 1 B. & Cressw. 186; Bell *v.* Cunningham, 3 Pet. 69, 81; Cairnes *v.* Bleecker, 12 John. 300; Courcier *v.* Ritter, 4 Wash. Cir. 549; Vianna *v.* Barclay, 3 Cowen, 281; Bredin *v.* Dubarry, 14 Serg. & R. 30; Richmond Manuf. Co. *v.* Starks, 4 Mason, 296. [But silence cannot be held to be a ratification where a party did not know of the unauthorized use of his name on a note until after it was due. Walters *v.* Munroe, 17 Md. 150. A wife's silence was held no ratification of a deed to which her husband without her knowledge had forged her name, and which he had delivered without her authority. Ladd *v.* Hildebrant, 27 Wisc. 135. But the principal must disavow the agent's acts within a reasonable time, or his silence will be held to be a ratification. Curry *v.* Hale, 15 W. Va. 867; Walker *v.* Walker, 7 Baxt. 260; Peck *v.* Ritchey, 66 Mo. 114; Western, &c. R. R. Co. *v.* McElwee, 6 Heisk. 208; Law *v.* Cross, 1 Black, U. S. 533. See Norris *v.* Cook, 1 Curtis, C. C. 464; Foster *v.* Rockwell, 104 Mass. 167. — Ed.]

[2] Ante, § 257, and note.

[3] 1 Emerig. Assur. ch. 5, § 6, p. 145; Straccha, De Assecur. gil. 11, n. 47; Casaregis, Disc. 30, n. 63; Disc. 102, n. 54; Disc. 131, n. 7; Disc. 225, n. 64.

[4] Mr. Livermore seems to doubt this. His language is (1 Liverm. on Agency, p. 50, ed. 1818): "When the relation of principal and agent does in fact exist, although in the particular transaction the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal, who has received a letter, informing him what has been done on his account. But, where the person doing the business, is a mere volunteer,

§ 259. In many cases, also, a ratification will be inferred from other collateral circumstances. Thus, if the principal, whose goods have been sold without his authority, should sue the purchaser for the debt due therefor, that would amount to a ratification of the sale; for the suit would not, upon any other ground, be maintainable in that form.[1] So, if a factor should sell goods for a price below his limits, and should send an account of sales to his principal, who should make no objection, but should draw for the balance admitted to be due on the account, it would amount to a ratification of the sale.[2] So, if the principal should sue the agent for the money received by him upon such sale, that would also amount to a ratification.[3] So, if a factor should purchase goods contrary to his orders;

who has officiously interfered in the affairs of another person, and has effected an insurance or made a purchase for him, without any color of authority, I do not conceive that the other person is bound to answer a letter from the intermeddler, informing him of the contracts so made in his name, nor that his silence can be construed into a ratification. Certainly no case has gone this length, and the opinion of the great Cujas is, that this is no ratification." The citation from Cujas, above referred to in § 257, note, is probably that on which the learned author relied; and if it is, it does not fully support his own position. Perhaps, in the cases of the intermeddling of mere strangers, it would be difficult to find any complete authority for so broad a position, as that the principal would, in all cases, be bound to answer the person who assumed to be his agent, and, if he did not, his silence should be construed into a ratification, and the doctrine of the Roman law, as to a negotiorum gestor, is unfavorable to it. But, on the other hand, it would be difficult to say, that his silence ought in no case to be construed as a ratification. Ante, § 239. If the act is *bona fide* done for the apparent benefit of the principal, it would be harsh to say, that its being done by a stranger, does not entitle him to the benefit of the silence of the principal, as a presumptive ratification, where he has had full notice of the act, and has done nothing to repudiate it.

[1] Wilson *v.* Poulter, 2 Str. 859; Smith *v.* Hodson, 4 T. R. 211; Ferguson *v.* Carrington, 9 B. & Cressw. 59; Peters *v.* Ballestier, 3 Pick. 495, 505, 506; Copeland *v.* The Merc. Ins. Co. 6 Pick. 198; [Ham *v.* Boody, 20 N. H. 411; Dodge *v.* Lambert, 2 Bosw. 570. Accepting the benefit of the acts of an unauthorized agent is a ratification of his authority. Woodbury *v.* Larned, 5 Minn. 339; Gibson *v.* Norway Savings Bank, 69 Me. 579].

[2] Richmond Manuf. Co. *v.* Starks, 4 Mason, 296.

[3] Wilson *v.* Poulter, 2 Str. 859; Bollen *v.* Hyde, 1 Atk. 128; Smith *v.* Hodson, 4 T. R. 211; Hovil *v.* Pack, 7 East, 164, 166; Zino *v.* Verdelle, 9 La. 51. But see Hunter *v.* Prinsep, 10 East, 378, 394; Fenemore *v.* United States, 3 Dall. 357; Kelley *v.* Munson, 7 Mass. 319; Woodward *v.* Suydam, 11 Ohio, 363. In Peters *v.* Ballestier, 3 Pick. 495, 505, the court held, that the mere bringing of a suit in assumpsit, by the assignees, under a bill of lading, for the proceeds of a cargo wrongfully sold by the master to creditors of the assignor, who had deducted their debt therefrom, for which sum the suit was brought against the creditors, but which suit was discontinued before a trial, and trover

and the principal should, by letter, refuse to accept the contract; but yet, having received the goods, he should afterwards sell them, not on his factor's account, but on his own account; that would amount to a ratification of the purchase.[1]

brought for the goods against the creditors, was not an affirmance of the sale; it appearing, that, before the suit in assumpsit was brought, the assignees had written to the creditors, saying, that the whole cargo belonged to them, and that the money was paid wrongfully, and claiming to have it repaid. The assignees, therefore, had full knowledge of all the facts; but seem to have brought the action of assumpsit under a mistake of the law. Perhaps it may be thought, that the doctrine of this case, upon this point, may require further consideration, since the action of assumpsit may be treated as a waiver of the tort. But then, upon the authority of Hunter *v.* Prinsep, 10 East, 378, 394, ought it so to be treated? [But where an agent sells a horse with warranty which he has no authority to give, an action brought after its death to recover its price is not a ratification of the unauthorized warranty. Cooley *v.* Perrine, 41 N. J. L. 322. — Ed.]

[1] Cornwall *v.* Wilson, 1 Ves. 509. The case of Hunter *v.* Prinsep, 10 East, 378, 394, seems to present an apparent exception to the rule, although it may be distinguished from the other cases. There, the master of a ship, which was wrecked in a foreign port, sold the cargo, and remitted the proceeds to the owners of the ship; and the owner of the cargo brought an action for money had and received to his use. It was contended, that, by this form of action, the plaintiff had affirmed the master's act in selling the goods; and that, consequently, the owners of the ship had a right to retain for the freight, *pro rata;* for the sale so affirmed had dispensed with the prosecution of the voyage. But it was held, that the plaintiff might recover without any deduction for freight; and that the only effect of this form of action was to waive any complaint, with a view to damages, of the tortious act, by which the goods were converted into money; and to confine the plaintiff's right to recover the net proceeds of the sale. On that occasion, Lord Ellenborough said: "The fallacy of the argument, on the part of the defendants, appears to us to consist in attributing more effect to the mere form of this action, than really belongs to it. In bringing an action for money had and received, instead of trover, the plaintiff does no more than waive any complaint, with a view to damages, of the tortious act, by which the goods were converted into money; and takes to the net proceeds of the sale, as the value of the goods; subject, of course, to all the consequences of considering the demand in question as a debt, and, amongst others, to that of the defendants having a right of set-off, if they should happen to have any counter demand against the plaintiff." See also Taylor *v.* Plumer, 3 M. & Selw. 562, 579, 580, where the doctrine is established, that the owner is entitled to pursue his property, in whosesoever hands he may find it, and into whatever other form it may have been converted. Upon this ground the action in Hunter *v.* Prinsep, 10 East, 378, was maintainable, although the goods had been illegally converted into money, as the money was the money of the plaintiff. Whether the doctrine in these cases is reconcilable with the decision in Wilson *v.* Poulter, 2 Str. 859, and Billon *v.* Hyde, 1 Atk. 126, may admit of some doubt; for in each of these cases, the property, for which the assignees sued, was their own, according to the principles established in Taylor *v.* Plumer, 3 M. & Selw. 562; and, consequently, they might sue for it in the very form

§ 260. In many cases, also, a ratification will be inferred from the mere habits of dealing between the parties, even where the course of dealing between them may not amount to satisfactory proof of an original authority.[1] Thus, if a broker has been accustomed in some instances to settle losses on policies for his principal in a particular manner, without any objection being made, or with the subsequent acquiescence of his principal, and he should afterwards settle other policies in the same manner, to which no objection should be made within a reasonable time, a presumption would arise of an implied ratification, even though the principal might, in some other cases, have expressed a disapprobation of that mode of settlement.[2]

which they adopted, without confirming the conversion. See Post, § 389; Jackson *v.* Clarke, 1 Y. & Jerv. 216; Peters *v.* Ballestier, 3 Pick. 495, 505, 506; Fenemore *v.* United States, 3 Dall. 357; Vernon *v.* Hankey, 2 T. R. 113, 121; Kelley *v.* Munson, 7 Mass. 319; Willinks *v.* Hollingsworth, 6 Wheat. 240; 2 Smith's Lead. Cas. 81, and note (2d ed.).

[1] Ante, § 95.

[2] [Where the consignees of an English firm were in the habit of receiving goods generally in India, and also of trading on their own account in and between the two countries, it was held, in an action brought by the consignors, that they were not bailees of the goods consigned, but commission merchants only, and, therefore, as such, not liable to account to the consignor for profits on goods received in India in exchange for those sent from England. Kirkham *v.* Peel, 43 L. T. R. N. S. 171; Knatchbull *v.* Hallett, 42 L. T. R. N. S. 421. — Ed.]

CHAPTER X.

LIABILITIES OF AGENTS TO THIRD PERSONS, ON CONTRACTS.

§ 261. LET us, in the next place, proceed to the consideration of the liabilities of agents to third persons. This may be either on contracts, or on torts. And first, on contracts. In general, when a man is known to be acting and contracting merely as the agent of another, who is also known as the principal, his acts and contracts, if he possesses full authority for the purpose, will be deemed the acts and contracts of the principal only, and will involve no personal responsibility on the part of the agent, unless the other circumstances of the case lead to the conclusion, that he has either expressly or impliedly incurred, or intended to incur, such personal responsibility.[1]

[1] 3 Chitty on Com. & Manuf. 211, 212; Post, § 263; Paterson *v.* Gandasequi, 15 East, 62; *Ex parte* Hartop, 12 Ves. 352; Owen *v.* Gooch, 2 Esp. 567; Mauri *v.* Heffernan, 13 John. 58, 77; Smith on Merc. Law, 78, 79; Johnson *v.* Ogilby, 3 P. Will. 277; 2 Kent, Comm. Lect. 41, pp. 629, 630 (3d ed.); Rathbone *v.* Budlong, 15 John. 1; Meyer *v.* Barker, 6 Binn. 234; Waring *v.* Cox, 1 Miller (La.), 198; Thomson *v.* Davenport, 9 B. & Cressw. 78. See also Mr. Smith's able note to this case, in his Leading Cases, vol. 2, pp. 222–227; Thomas's Ex'or *v.* Edwards, 2 Mees. & Wels. 215; Krumbhaar *v.* Ludeling, 3 Miller (La.), 642; La Farge *v.* Ripley, 16 Martin, 308; Zacharie *v.* Nash, 13 La. 21; Smith on Merc. Law, p. 140 (3d ed. 1843); Campbell *v.* Baker, 2 Watts, 83. Mr. Chancellor Kent, in his learned commentaries, uses the following language: "It is a general rule, standing on strong foundations, and pervading every system of jurisprudence, that, where an agent is duly constituted, and names his principal, and contracts in his name, the principal is responsible, and not the agent." 2 Kent, Comm. Lect. 41, pp. 629, 630 (4th ed.); Ante, §§ 154, 155; Post, §§ 263–270; [Haight *v.* Sohler, 30 Barb. 224; Buck *v.* Amidon, 4 Daly, 126; Whitney *v.* Wyman, 101 U. S. 392. And to relieve an agent from liability upon an implied warranty of the genuineness of a promissory note which afterwards proved to be forged, the purchaser must have understood, or, as a reasonable man, ought to have understood, that he was dealing with him only as an agent. Worthington *v.* Cowles, 112 Mass. 30; Brainard *v.* Turner, 4 Ill. App. 61. So, where a broker gave a sold note, "I have sold to your order and for your account to my principal," it was held, in the absence of any usage to render the broker liable, he was not personally bound by the contract. Southwell *v.* Bowditch, L. R. 1 C. P. D. 100, 374; Humfrey *v.* Dale, El. B. & El. 1004. — ED.]

If a different rule were to prevail, it would greatly embarrass all the transactions of parties, and especially those of a commercial nature, through the instrumentality of agents; since the latter could never escape a personal responsibility, in the execution of a mere authority, by any precautions whatsoever. This was one of the embarrassments growing out of the strict rule of the Roman civil law, whereby acts done, and contracts made, through the instrumentality of agents, did not, ordinarily, bind the principals, *ex directo*, to each other, so as to create mutual obligations and rights of action by and between them.[1]

[1] Ante, § 163; Post, §§ 271, 425, 426. Mr. Livermore has remarked, 2 Liverm. on Agency, pp. 253, 254 (ed. 1818), upon this peculiarity of the Roman law. He says: "The Roman lawyers made a distinction between a promise, made in the name of a third person, that such third person should do a particular act, and an engagement to procure him to do it. In the first case they held, that the agent was not bound; in the last, that he was. It is a principle of the Roman law, that no person can stipulate, or promise, except for himself. If, therefore, John had promised Peter, that Paul should give him a sum of money, or do for him any particular act, neither John nor Paul would, by that law, have incurred any obligation. But, if the promise had been, to procure Paul to give the money, or to do the act, this would have been a valid undertaking on the part of John, which would have made him responsible to Peter. In the first case, it is said, that it does not appear to have been the intention of the party, who made the promise, to bind himself; that there is no consent from him to give, or to do; or if there were, that he has not expressed it; and, therefore, there can be no obligation. From the nature of the act to be done, however, the presumption was often admitted, that the person promising did not promise simply for another, but that he had engaged himself for the performance, although not so expressed; as, if a person promised, that another would be his surety; or if, the agent's authority being doubted, he promised, that his principal should ratify his act. Vinnius says, that in Holland, and in most parts of Europe, he who promises for the performance of another, is understood to engage himself for that performance." The texts of the Roman law, which he cites, are as follows: "Si quis alium daturum facturumve quid promiserit, non obligabitur; veluti, si spondeat Titium quinque aureos daturum. Quod si, effecturum se, ut Titius daret, spoponderit; obligatur. Inst. Lib. 3, tit. 20, § 3. Itaque alius, pro alio, promittens daturum facturumve eum, non obligatur; nam de se quemque promittere oportet. Dig. Lib. 45, tit. 1, l. 83. Nemo autem alienum factum promittendo obligatur. Dig. Lib. 45, tit. 1, l. 38. Sicut reus principalis non alias, quam si de sua persona promittat, obligatur: Ita fidejussores non alias tenentur, quam si se quid daturos vel facturos promittant. Nam reum principalem daturum vel facturum aliquid frustra promittunt; quia factum alienum inutiliter promittitur. Dig. Lib. 46, tit. 1, l. 65." "Quotiens quis alium sisti promittit, nec adjicit pœnam (puta, vel servum suum, vel hominem liberum), quæritur, an committator stipulatio? Et Celsus ait, etsi non est huic stipulationi additum, nisi steterit, pœnam dari; in id, quanti interest sisti, contineri. Et verum est, quod Celsus ait; nam qui alium sisti promittit, hoc promittit, id se acturum, ut stet. Dig. Lib. 45. tit. 1, l. 81. Et vide Dig. Lib. 13, tit. 5, l. 14, § 2, et Dig. Lib. 45, tit. 1.

The remedy was limited to the immediate parties to the act or contract. The agent (and not his principal) had a direct remedy against the person, with whom he acted, or contracted; and the latter had a direct remedy, upon the same act, or contract, against the agent personally, and against him only.[1] It was to cure this defect in the administration of justice in commercial transactions, that the prætor interfered, and, in the case of shopkeepers, and owners and employers of ships, or other persons engaged in trade, made them (as we have seen) directly liable for the acts done, and for the contracts made by the clerks, ship-masters, and other agents (called *institores*), employed by them, within the scope of their ordinary business.[2] However, in cases where the principal was so bound, the agent,

l. 38." The language of the Code on this very point is very direct: Certissimum enim, est, ex alterius contractu neminem obligari. Cod. Lib. 4, tit. 12, l. 3. Vinnius, in his commentary on the passage, in 3 Inst. Lib. 3, tit. 20, § 3, n. 1, states the reason, on which the distinction is founded, in the following words: "Qui alium daturum aut facturum promittit, neque ipse obligatur, neque alium obligat. Cur alium non obliget, ratio manifesta est, quia nemo ex contractu alterius obligari potest. l. 3, Code ne ux. pro mar. Cur ipsi non obligetur, duæ causæ sunt: una, quia non consentit, ut det aut faciat: altera, quia, etsi, proponamus, eum dare aut facere velle, tamen verbis id non promittit; quorum utrumque per se solum ex regulis communibus stipulationum satis est ad impediendam verborum obligationem. De se igitur quemque promittere oportet, si eum, obligari volumus. Dig. l. inter. 83, in pr. de verb. obl. Sed an non saltem, hactenus eum, qui alium daturum aut facturum promisit, obligari dicimus, ut curare debeat, ut ille alius det, aut faciat? Dicendum est, ne hactenus quidem eum obligari; alioqui stipulatio hæc non esset inutilis; sed factum alienum utilitur promitteretur, contra quam in universum definit Hermogen. l. sicut 65, de fidejuss. & Ulpian. l. stipilatio, 38, in pr. de verb. obl."

[1] Ante, § 163; 1 Stair, Instit. by Brodie, B. 1, tit. 12, §§ 16, 86; Ersk. Inst. B. 3, tit. 3, §§ 43, 46. The only remedy, by the agent, in such cases, was against his principal, to compel him to a personal and strict performance of what the agent, in his behalf, had undertaken should be done. See 1 Domat, B. 1, tit. 15, § 2, art. 1, § 6; Id. § 1, art. 11; Id. tit. 17, § 2, art. 1.

[2] Ante, §§ 8, 88, 128; 1 Domat, B. 1. tit. 16, § 3, art. 1–3; Dig. Lib. 14, tit. 3, l. 1; Pothier, Pand. Lib. 14, tit. 1, n. 9, 10, 17, 18; Id. tit. 3, n. 1–4; Dig. Lib. 14, tit. 3, l. 1, 3, 4; Ersk. Inst. B. 3, tit. 3, §§ 43, 46; 1 Stair, Inst. B. 1, tit. 12, §§ 16, 18, 19. The language of the Digest on this subject is: Æquum Prætori visum est, sicut commoda sentimus ex actu Institorum, ita etiam obligari nos ex contractibus ipsorum, et conveniri. Dig. Lib. 14, tit. 3, l. 1; Pothier, Pand. Lib. 14, tit. 3. n. 1; Id. tit. 1, n. 1, 2. In these cases, although the prætor gave an action against the principal, in favor of third persons dealing with his agent, institor, or ship-master, yet his edict did not give a reciprocal action by the principal against such third person, and the remedy was doubted. Dig. Lib. 14, tit. 1, l. 1, § 18; Id. tit. 3. l. 1; Pothier, Pand. Lib. 14, tit. 1, n. 18; Id. tit. 3, n. 4, and Pothier's note (3), who suggests that the equity is reciprocal.

acting as institor, was not, ordinarily, deemed to be personally bound, when he openly acted in the name of his principal, and not in his own.[1]

§ 262. The rule of our law, which ordinarily exempts agents who are acting within the scope of their authority, from all liability, is certainly founded in general convenience and sound policy.[2] And it has, accordingly, been generally adopted by the modern commercial nations of Europe.[3] But our law does not, any more than the law of those nations, exempt the agent from personal responsibility, where he chooses, by his own act or contract, voluntarily to incur it, or where, from his own conduct, or the form of the act or contract, it is necessarily implied, or created, by operation of law.[4] Perhaps,

[1] 1 Domat, B. 1, tit. 16, § 3, art. 8; Dig. Lib. 14, tit. 3, l. 20; Pothier, Pand. Lib. 14, tit. 1, n. 9, 10, 17, 18; Id. tit. 3, n. 2; Ersk. Inst. B. 3, tit. 3, § 46; Pothier on Oblig. n. 74, 447–449; 1 Emerig. Assur. ch. 5, § 3, pp. 137, 138. The case put in the Digest is that of a banker, whose agent wrote a letter, as agent of his principal, informing another person of a sum of money put to his credit; in which it was held, that the agent was not personally responsible therefor. Lucius Titius mensæ nummulariæ, quam exercebat, habuit libertum præpositum. Is Gaio Seio cavit in hæc verba. "Octavius Terminalis, rem agens Octavii Felicis, Domitio Felici, Salutem. Habes penes mensam patroni mei denarios mille, quos denarios vobis numerare debebo pridie kalendas Maias." Quæsitum est, Lucio Titio defuncto sine hærede, bonis ejus venditis, an ex epistola jure conveniri Terminalis possit? Respondit nec jure his verbis obligatum, nec æquitatem conveniendi eum superesse; quum id Institoris officio, ad fidem mensæ protestandam, scripsisset. Dig. Lib. 14. tit. 3, l. 20; Pothier, Pand. Lib. 14, tit. 3, n. 2; 2 Emerig. Assur. ch. 4, § 12, pp. 465, 466; Ersk. Inst. B. 3, tit. 3, § 46; 1 Domat, B. 1, tit. 16, § 3, art. 8; 2 Liverm. on Agency, ch. 11, p. 247, and note. And again it is said: Item; si procuratori tuo mutuam pecuniam dedero tui contemplatione, ut creditorem tuum, vel pignus tuum liberet; adversus te negotiorum gestorum habebo actionem; adversus eum, cum quo contraxi, nullam. Dig. Lib. 3, tit. 5, l. 6, § 1; Pothier, Pand. Lib. 3, tit. 5, n. 4.

[2] 2 Kent, Comm. Lect. 41, pp. 629, 630 (4th ed.).

[3] 1 Stair, Inst. by Brodie, B. 1, tit. 12, §§ 16, 18, 19; Ersk. Inst. B. 3, tit. 3, §§ 45, 46; 1 Domat, B. 1, tit. 16, § 3, art. 8; Pothier on Oblig. n. 74, 447–449; 1 Domat, B. 1, tit. 16, § 3, art. 8; 1 Emerig. Assur. ch. 5, § 3, pp. 137, 138; 2 Emerig. Assur. ch. 4, § 12, p. 465; Pothier, Traité de Assur. n. 96. Emerigon lays down (2 Emerig. Assur. ch. 4, § 12, p. 465) the general rule, in these words: "En règle générale, le commissionaire, qui promet, qui stipule, qui agit en sa qualité de prépose, ne s'oblige pas en son nom propre. Il est simple ministre et exécuteur. Il est tenu à rien de plus qu'à exhiber son mandat. Mais le commissionaire, qui contracte en son nom, s'oblige sans distinction vis-a-vis du tiers avec qui il contracte, parce qu'on ignore sa qualité, et qu'il est censé plutôt agir pour soi, que pour autrui. Potius meo nomine, quam pro alio." Post, § 271.

[4] Pothier on Oblig. n. 74, 447, 448; Ante, § 261; Post, §§ 263–270.

after all, the Roman law did not, in this respect, differ so essentially in principle from ours, as at first view it would seem to differ. That law held the agent (as we have seen)[1] to be personally liable, in cases where he was the sole immediate party to the contract; but if he was named and acted solely as agent for a known principal he was ordinarily exempted from liability.[2] The principal difference between our law and the Roman law seems to have been, that ordinarily, and independently of the prætor's edict, the agent could contract only in his own name, and not in that of his principal, and the latter was not directly bound thereby.[3]

§ 263. In regard to the liability of agents to third persons, it may, then, be laid down as a general rule, subject to the exceptions hereafter stated: (1) That, when an agent executes a deed, or other instrument, in the name of his principal, he is not personally bound thereby; (2) That when he makes an oral or verbal contract, as agent for another, and at the same time he names his principal, he is not personally bound thereby; (3) And as a corollary from the preceding propositions, or, rather, as a generalization of them, that, when, in making a contract, no credit is given to himself, as

[1] Ante, § 261, and note; Dig. Lib. 14, tit. 3, l. 20; Pothier, Pand. Lib. 14, tit. 3, n. 2; 1 Domat, B. 1, tit. 16, § 3, art. 8; Pothier on Oblig. n. 74, 447, 448.

[2] Domat has laid down the doctrine in the following terms: "Factors and agents, who treat only in this quality (i. e. as agents), are not bound in their own names by the engagements which they contract on account of the business which is intrusted to them, and in the name of their masters." 1 Domat, B. 1, tit. 16, § 3, art. 8, by Strahan. See also 1 Emerig. Assur. ch. 5, § 3, pp. 137–139, who lays down the same rule as that in the text, that the agent is not personally bound, where he contracts in the name of his principal. His language is (as we have seen), that, by the general rule, the agent (le commissionaire), who acts in this quality, is not held in his own proper name. Ante, § 262, note. It is also a rule, that he who acts on account of a friend, or for a person to be named, is not bound personally, and acquires nothing for himself, when he names the person for whom he has acted, or whom he has pointed out. This designation (nomination) has a retroactive effect to the time of the contract, which is considered as if it had been made by the person named. He admits, however, that in cases of insurance, usage has overborne the theory, and made the agent personally liable. But in such cases the agent for the insurance, although he contracts on account of another, becomes himself a party to the contract. Ibid. Our law on this very point conforms to the usage stated by Emerigon; and the like doctrine is supported by Valin and Pothier. 2 Valin, Comm. Liv. 3, tit. 6, art. 3, pp. 33, 34; Pothier, Assur. n. 96; 2 Emerig. Assur. ch. 4, § 12, pp. 465, 467.

[3] 2 Valin, Comm. Liv. 3, tit. 6, art. 3, pp. 33, 34; Pothier, Assur. n. 96; 2 Emerig. Assur. ch. 4, § 12, pp. 465, 467.

agent, but credit is exclusively given to his principal, he is not personally liable thereon.[1] Indeed, in most cases of purchases, and sales, and contracts for labor and services, through the instrumentality of an agent, the great question is, to whom credit is given, whether to the principal alone, or to the agent alone, or to both.[2]

§ 264. Let us proceed, then, to the important inquiry, in what cases an agent is personally responsible to third persons for acts done, or for contracts made with them, in the name, or on behalf of his principal. And, in the first place, it may be stated, that, wherever a party undertakes to do any act, as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person, with whom he is dealing for or on account of his principal.[3] There can be no doubt, that this is, and

[1] Goodbaylie's case, Dyer, 230 *b*. Marg.; Owen *v.* Gooch, 2 Esp. 567; 3 Chitty on Com. & Manuf. 211, 212; Meyer *v.* Barker, 6 Binn. 234; Johnson *v.* Ogilby, 3 P. Will. 277; Dubois *v.* Delaware & Hudson Canal Co. 4 Wend. 285; 4 Kent Comm. Lect. 41, pp. 631, 632 (4th ed.). In *Ex parte* Hartop, 12 Ves. 352, Lord Chancellor Erskine said: "No rule of law is better ascertained, or stands upon a stronger foundation, than this; that where an agent names his principal, the principal is responsible, not the agent. But, for the application of that rule, the agent must name his principal, as the person to be responsible. In the common case of an upholsterer, employed to furnish a house; dealing himself in only one branch of business, he applies to other persons to furnish those articles in which he does not deal. Those persons know the house is mine. That is expressly stated to them. But it does not follow, that I, though the person to have the enjoyment of the articles furnished, am responsible. Suppose another case. A person instructs an attorney to bring an action, who employs his own stationer, generally employed by him. The client has nothing to do with the stationer, if the attorney becomes insolvent. The client pays the attorney. The stationer, therefore, has no remedy against the client." Upon a similar ground, where goods were consigned to A. B. for the London Gas Co. or his assigns, he or they paying freight, and the goods were delivered to A. B., it was held, that he was not liable for the freight. Amos *v.* Temperley, 8 Mees. & Wels. 798, 805. See the English Jurist, March 11, 1843, p. 75. See Post, §§ 274, 395. [But in Parker *v.* Winslow, 7 El. & Bl. 946, Lord Campbell, C. J., said that the qualification of Lord Erskine was that the agent must name his principal "as the person to be responsible." Hall *v.* Huntoon, 17 Vt. 244; Colvin *v.* Holbrook, 2 Com. App. Cas. 126.]

[2] Graham *v.* Stamper, 2 Vern. 146; Post, §§ 266–270, 279; 2 Kent, Comm. Lect. 41, pp. 632, 633 (4th ed.).

[3] Polhill *v.* Walter, 3 B. & Adolph. 114; Parrott *v.* Wells, 2 Vern. 127; Bayley on Bills, ch. 2, § 7 (5th ed.); 3 Chitty on Com. & Manuf. 212; Sumner *v.* Williams, 8 Mass. 178; Bowen *v.* Morris, 2 Taunt. 385, 386; East India Co. *v.* Hensley, 1 Esp. 112; Smith on Merc. Law, 79, 80 (2d ed.); 2 Kent, Comm. Lect. 41, pp. 629–632 (4th ed.); Johnson *v.* Ogilby, 3 P. Will. 278, 279; Meech *v.* Smith, 7 Wend. 315; Dusenbury *v.* Ellis, 3 John. Cas. 70; per Lord

ought to be, the rule of law in the case of a fraudulent representation made by the agent, that he has due authority to act for the principal; for it is an intentional deceit. The same rule may justly apply, where the agent has no such authority, and he knows it, and he nevertheless undertakes to act for the principal, although he intends no fraud.[1] But another case may be put, which may seem to admit of more doubt; and that is, where the party undertakes to act, as an agent, for the principal, *bona fide*, believing that he has due authority; but, in point of fact, he has no authority, and, therefore, he acts under an innocent mistake. In this last case, however, the agent is held by law to be equally as responsible, as he is in the two former cases, although he is guilty of no intentional fraud or moral turpitude.[2] This whole doctrine proceeds upon a plain principle of justice; for every person, so acting for another, by a natural, if not by a necessary, implication, holds himself out, as having competent authority to do the act; and he thereby draws the other party into a reciprocal engagement. In short, the signature of the agent amounts to an affirmation, that he has authority to do the particular act; or, at all events, that he *bona fide* believes himself to have that authority.[3]

Holt, in Holt's Rep. 809. See Woodes *v.* Dennett, 9 N. H. 55; Jones *v.* Downman, 4 Adolph. & Ellis, N. S. 237, note; Downman *v.* Jones, 9 Jurist, pp. 454–458 (1845); [Palmer *v.* Stephens, 1 Denio, 471; Pitman *v.* Kintner, 5 Blackf. 250; Silliman *v.* Fredericksburg R. Co. 27 Gratt. 119; Randell *v.* Trimen, 38 Eng. Law & Eq. 276; 18 Com. Bench, 786; Collen *v.* Wright, 8 El. & Bl. 648; Spedding *v.* Nevell, L. R. 4 C. P. 212; Godwin *v.* Francis, L. R. 5 C. P. 295.]

[1] Downman *v.* Jones, 9 Jurist, pp. 454–458 (1845).

[2] Smout *v.* Ilbery, 10 Mees. & Wels. 1, 9, 10. See Downman *v.* Jones, 9 Jurist, pp. 454–458 (1845). [See Kelner *v.* Baxter, 2 Law Reps. Com. Pleas, 174; Randell *v.* Trimen, 18 C. B. 786.]

[3] Post, § 265; Layng *v.* Stewart, 1 Watts & Serg. 222; Polhill *v.* Walter, 3 B. & Adolph. 114; Long *v.* Colburn, 11 Mass. 97; Dusenbury *v.* Ellis, 3 John. Cas. 70; Ballou *v.* Talbot, 16 Mass. 461; Meech *v.* Smith, 7 Wend. 315; Feeter *v.* Heath, 11 Wend. 477. There is no doubt of the personal liability of the agent in all cases, where he falsely affirms, that he has authority; as he does, when he signs the instrument, as agent of his principal, and knows that he has no authority. But, another question (as we see by the text) has been made, whether he is liable, when he supposes that he has authority, and he has none; as, for example, where he misconstrues the instrument, conferring authority on him; or, where the instrument, conferring the authority, turns out to be a forgery, and he supposed it to be genuine. In Polhill *v.* Walter, 3 B. & Adolph. 114, Lord Tenterden, in delivering the opinion of the court, seems to have thought, that the right of action was founded solely upon there being an affirmation of authority, when the party knew it to be false; and that, therefore, if the party acted under the authority of a forged instrument, supposing it to be genuine, he would not be responsible. But there is great

If he has no such authority, and acts *bona fide*, still he does a wrong to the other party; and if that wrong produces an injury to the latter, owing to his confidence in the truth of an express or implied assertion of authority by the agent, it is perfectly just, that he who makes such an assertion, should be personally responsible for the consequences, rather than that the injury should be borne by the other party, who has been misled by it.[1] Indeed, it is a plain principle of equity, as well as of law, that where one of two innocent persons must suffer a loss, he ought to bear it, who has been the sole means of producing it, by inducing the other to place a false confidence in his acts, and to repose upon the truth of his statements.[2]

§ 264 *a*. But although an agent who undertakes to act for a principal without authority, or exceeds his authority, is responsible to the other contracting party therefor; yet it may sometimes, under such circumstances, become a nice question, in cases of contracts made by him as agent, and in the name of his principal, in what manner the remedy is to be sought against him, whether by an action *ex directo* against him upon the contract itself, or by a special action on the case, for the wrong done thereby to the other contract-

reason to doubt this doctrine; for, if a person represents himself as having authority to do an act when he has not, and the other side has been drawn into a contract with him, and the contract becomes void for want of such authority, the damage is the same to the party who confided in such representation, whether the party making it, acted with a knowledge of its falsity or not. In short, he undertakes for the truth of his representation. No such distinction was relied on in Dusenbury *v*. Ellis, 3 John. Cas. 70; Rossiter *v*. Rossiter, 8 Wend. 494; Ballou *v*. Talbot, 16 Mass. 461; in all which cases the note was signed, or indorsed, without authority from the principal. The court there put the liability of the agent upon the general ground, that he acted without authority. The distinction of Lord Tenterden is now entirely overthrown in the recent case of Smout *v*. Ilbery, 10 Mees. & Wels. 1, 9, 10. See also the very able note of Mr. Smith, to the case of Thomson *v*. Davenport, 9 B. & Cressw. 78, in his "Leading Cases," Vol. 2, pp. 222–227; Post, § 265 *a*, note. As to what would be the effect of a subsequent ratification by the principal, and whether it would take away any right of action against the agent, see Ante, § 244, and note.

[1] Smout *v*. Ilbery, 10 Mees. & Wels. 1, 9, 10; Post, § 265 *a*. [If an agent, who is duly authorized to sign "all notes and business paper" of a corporation, gives accommodation notes in the name of the company, the corporation, notwithstanding any want of authority of the agent to execute them for the purposes for which they were given, is liable on them to a holder who took them in good faith, for value before maturity; and, therefore, such holder, not being injured by the unauthorized act of the agent, cannot maintain an action against him therefor. Bird *v*. Daggett, 97 Mass. 494. — G.]

[2] Ante, § 56. [See Campbell *v*. Hillman, 15 B. Monr. 515.]

ing party. It seems clear, that in no case can an agent be sued on the very instrument itself, as a contracting party, unless there are apt words therein so to charge him. Thus, if a person acting as agent for another should, without authority or exceeding his authority, make and execute a deed in the name of his principal, and not in his own name, the agent would not be liable thereon, although it would not bind the principal.[1] But, suppose, there are

[1] Stetson *v.* Patten, 2 Greenl. 358; Post, §§ 274 *a*, 277, 278; Ante, § 49, note; Wells *v.* Evans, 20 Wend. 251; [Taylor *v.* Shelton, 30 Conn. 122. The principle upon which one making a contract in behalf of another, without authority, is to be held liable, is learnedly discussed by Selden, J., delivering the opinion of the court in White *v.* Madison, 26 N. Y. Ct. Ap. 117, and concludes that his liability rests on the ground that he warrants his authority, and not that the contract is to be deemed his own; and that the damages to which the proposed agent subjects himself are measured, not by the contract, but by the injury resulting from his want of power, and include, e. g., the costs of an unsuccessful action against the alleged principal to enforce the contract. In Abbey *v.* Chase, 6 Cush. 54, where the defendant signed his name as agent to a sealed instrument, the body of the covenant being in the name of the principal "by their agent," &c., Metcalf, J., said: "It does not appear whether the defendant had authority to bind the Hadley Falls Company, by deed or otherwise. But, in the view which we take of the case, that question is immaterial. We deem it very manifest, on inspection of the instrument in suit, that it was the intention of the defendant to bind the company, and not to bind himself; and that the plaintiff must have so understood the contract. And if this had been a simple contract, executed by an authorized agent, the law would have given effect to that intention. The company, and not the defendant, would have been bound. The authorities on this point are numerous and decisive. Northampton Bank *v.* Pepoon, 11 Mass. 292; Andrews *v.* Estes, 2 Fairf. 270; New England Ins. Co. *v.* DeWolff, 8 Pick. 56; Rice *v.* Gove, 22 Pick. 161; Bayley on Bills (2d Am. ed.), 72, 73. But when a sealed instrument is executed by an agent or attorney, for the principal, the strict technical rule of the common law, which has never been relaxed in England or in this commonwealth, requires that it be executed in the name of the principal, in order to make it his deed. Brinley *v.* Mann, 2 Cush. 337. In such cases, says Story, J., 'the law looks not to the intent alone, but to the fact, whether that intent has been executed in such a manner as to possess a legal validity.' 5 Pet. 350. See also Locke *v.* Alexander, 1 Hawks, 416. The plaintiff's counsel, in applying this strict rule to the instrument in suit, contends that it does not bind the Hadley Falls Company, and that, as the defendant has not bound the company, he has bound himself. But in deciding whether the defendant has or has not bound himself, we need not decide whether he has or has not bound the company. For it does not necessarily follow, that a contract, made by an authorized agent, which does not bind the principal, becomes the agent's contract, and makes him answerable if it is not performed. This depends upon the legal effect of the terms of the contract. If the agent employs such terms as legally import an undertaking by the principal only, the contract is the principal's, and he alone is bound by it. But if the terms of the contract legally import a personal undertaking of the agent, and not of the

apt words in the instrument which may charge him personally, and yet he signs the same in his own name as agent of another, the question may be presented under a different aspect. Thus for example, if an agent should, without due authority, make a promissory note, saying in it, "I promise to pay," &c., and sign it "C. D. by A. B. his agent," or "A. B. agent of C. D.;" in such a case may the words as to the agency be rejected, and the agent be held personally answerable as the promisee of the note? Upon this point the authorities do not seem to be entirely agreed.[1]

principal, then it is the contract of the agent, and he alone is answerable for a breach of it. So, when one who has no authority to act as another's agent, assumes so to act, and makes either a deed or a simple contract, in the name of the other, he is not personally liable on the covenants in the deed, or on the promise in the simple contract, unless it contains apt words to bind him personally. Stetson *v.* Patten, 2 Greenl. 358; Ballou *v.* Talbot, 16 Mass. 461; Delius *v.* Cawthorn, 2 Dev. 90. The only remedy against him, in this commonwealth, is an action on the case for falsely assuming authority to act as agent. See also 13 Adolph. & Ellis, N. S. 744.

"These principles lead us to the conclusion that the ruling at the trial of this case was wrong, and that the defendant is not chargeable in the present action. The instrument sued on purports to be, and was intended to be, a deed *inter partes;* namely, the Hadley Falls Company and the plaintiff. The defendant, as agent of the company, signed his own name, merely adding thereto the word 'agent,' and affixed his own seal; the plaintiff signed his name and affixed his seal; and these acts were done as the acts of the parties before named. It seems to us impossible to charge the defendant, on this instrument, as on a contract made by him with the plaintiff. If any words had been inserted in the instrument, expressing the defendant's personal undertaking to fulfil the contract on behalf of the company, he would have been personally bound, although the instrument was prepared as a deed *inter partes.* Salter *v.* Kingly, Carth. 76, and Holt, 210. But no such words are found in the instrument." — R.]

[1] See Downman *v.* Jones, 4 Q. B. 235, note. In cases where a person executes an instrument in the name of another without authority, there is some diversity of judicial opinion, as to the form of action in which the agent is to be made liable for the breach of duty. In England, it has been intimated that the suit must be by a special action on the case. Polhill *v.* Walter, 3 B. & Ad. 114. The same doctrine has been asserted in Massachusetts. Long *v.* Colburn, 11 Mass. 97; Ballou *v.* Talbot, 16 Mass. 461; Jefts *v.* York, 4 Cush. 371, an important case on this subject; s. c. 10 Cush. 392; and in Pennsylvania, in Hopkins *v.* Mehaffy, 11 Serg. & R. 129. In New York it has been held, that an action may, under such circumstances, be maintained upon the instrument, as if it were executed by the agent personally. Thus, if an agent, without authority, should sign a note in the name of another, it has been held that he may be sued thereon, as if it were his own note. Dusenbury *v.* Ellis, 3 John. Cas. 70; Ante, § 251. note. See also White *v.* Skinner, 13 John. 307; Meech *v.* Smith, 7 Wend. 315; Cunningham *v.* Soules, 7 Wend. 106; Stetson *v.* Patten, 2 Greenl. 358; 2 Kent, Comm. Lect. 41, pp. 631, 632 (4th ed.); Chitty on

§ 265. This doctrine, however, as to the liability of the agent, where he contracts in the name and for the benefit of the principal,

Contr. 211. See also Woodes *v.* Dennett, 9 N. H. 55; Grafton Bank *v.* Flanders, 4 Id. 239; Mayhew *v.* Prince, 11 Mass. 54; 2 Kent, Comm. Lect. 41, pp. 631, 632 (4th ed.); Clay *v.* Oakley, 17 Martin, 137; Perkins *v.* Washington Ins. Co. 4 Cowen, 645; Feeter *v.* Heath, 11 Wend. 477; Harper *v.* Little, 2 Greenl. 14; Lazarus *v.* Shearer, 2 Ala. 718. However, if an agent, in purchasing goods should exceed his authority, he may be properly treated as the purchaser, since no other person would be liable. Hampton *v.* Speckenagle, 9 Serg. & R. 212. [In Richardson *v.* Williamson, L. R. 6 Q. B. 276, the plaintiffs lent £70 to a benefit building society, and received a receipt, signed by the defendants as two directors of the society, certifying that the plaintiff had deposited £70 with the society, for three months certain, to be repaid with interest after fourteen days' notice. The plaintiff withdrew £20; and, after having given to the society due notice to withdraw the rest, was unable to obtain it. The society, which was established by act of parliament, had no power to borrow money. The plaintiff in this action sought to make the defendants personally liable. The court being at liberty to draw inferences of fact, it was held, on the authority of Collen *v.* Wright (7 E. & B. 301; 8 E. & B. 647), that the defendants were liable for a breach of warranty; they having, by signing the receipt, impliedly warranted that they had authority to enter into a binding contract on behalf of the society. See also Cherry *v.* Colonial Bank of Australia, L. R. 3 P. C. 24; Weeks *v.* Propert, L. R. 8 C. P. 427. In Noyes *v.* Loring, 55 Me. 408, the defendant, a deputy collector of town taxes, directed the plaintiffs to publish an advertisement requesting tax-payers to pay their taxes to him forthwith, and charge the price of such publication to the town; and the plaintiffs followed the defendant's direction; but the town denied the defendant's authority to contract for the publication, and refused to pay for the same. In assumpsit for the price, it was held, the plaintiff could not maintain an action upon the contract; but that the remedy was an action on the case for deceit. See Mr. Holmes's note, "*Liability of Agent for Unauthorized Acts*," 2 Kent, Comm. (12th ed.) 632. Whether the liability of one who undertakes without authority to contract as agent is in assumpsit upon an implied warranty, or in a special action upon the case, seems to be but a question of words. The action on the case originally embraced actions of assumpsit, and "assumpsit" and "case" have never become entirely separated. Either case or assumpsit will lie for a breach of warranty. Indeed, such actions were originally brought in case, and not in assumpsit. Williamson *v.* Allison, 2 East, 446. (Perhaps actual fraud was originally necessary to constitute a breach of warranty. 1 Thorpe, Anct. Laws of Eng. 181, 183.) If now brought in case, a *scienter* need not be alleged; or, if alleged, need not be proved. A special action on the case against an agent would in effect be an action on the case for the breach of an implied warranty. The difference would be but verbal: the same evidence which would support the one would support the other. — G.] [And in a recent case it was held that an agent who makes a contract not binding on his principal by reason of the fact that it was unauthorized, is liable in damages to the person dealing with him; and this liability rests upon an implied warranty of authority, and the remedy is an action for its breach; but in order to make the agent liable, the contract must be one that could be enforced against the principal if authorized. Baltzen *v.* Nicolay, 53

without having due authority, is founded upon the supposition, that the want of authority is unknown to the other party, or, if known, that the agent undertakes to guarantee a ratification of the act by the principal.[1] But circumstances may arise, in which the agent would not or might not be held to be personally liable, if he acted without authority, if that want of authority was known to both parties, or unknown to both parties. Thus, if, at the time of the contract, the agent should declare that he had no authority, but that he thought his principal would ratify the act, as being for his benefit; and, at the same time, he should declare that he only acted as expressive of his opinion and belief, and did not intend to bind himself personally, if the principal should not ratify it, and this was fully understood and agreed to on the other side; in such a case, there would not seem to be any legal ground upon which, in case of a non-ratification by the principal, the agent thus, acting *bona fide*, could be held personally responsible.

§ 265 *a*. But let us suppose another case, where an agent contracts in the name of his principal, having an original authority so to do; and it turns out that, unknown to both parties, the authority has been revoked by the death of the principal, so that, in contemplation of law, there exists no principal; the question will then arise, whether, inasmuch as neither the principal nor his legal representative is bound by the contract,[2] the agent, who has acted *bona*

N. Y. 467. And the same doctrine has recently been held in England in the case of Collen *v*. Wright, 8 El. & Bl. 646; 7 Ibid. 301; although Cockburn, C J., dissented in an able opinion, in which he cites with approval "Professor" Story's work on Agency, § 264. The earlier English cases held that the remedy was by a special action on the case, Lewis *v*. Nicholson, 18 Q. B. 503, and cases cited, *supra;* but an agent is not liable on a written contract itself, made by him in the name of his principal, merely because he had no authority to make it. Jenkins *v*. Hutchinson, 13 Q. B. 744; Lewis *v*. Nicholson, *supra*. See Moor *v*. Wilson, 6 Foster, 332; Roberts *v*. Button, 14 Vt. 195; Palmer *v*. Stephens, 1 Denio, 471; Royce *v*. Allen, 28 Vt. 234; Donahoe *v*. Emery, 9 Metc. 63; Walker *v*. Bank of N. Y., 9 N. Y. 582; Draper *v*. Mass. Steam Heating Co., 5 Allen, 338; Sheffield *v*. Laduc, 16 Minn. 388; Byars *v*. Doores, 20 Mo. 284; Coffman *v*. Harrison, 24 Mo. 524; Bank of Hamburg *v*. Wray, 4 Strobh. 97; Pettingill *v*. McGregor, 12 N. H. 179. And where an agent assumes without authority to bind another by a promissory note, and his language also imports a promise by him personally, he will be bound as promisor. Weare *v*. Gove, 44 N. H. 196. See Ellis *v*. Pulsifer, 4 Allen, 165, as to the liability of an agent where he signs a sealed instrument purporting to be that of his principal, but without authority from the latter. — Ed.]

[1] [Hall *v*. Lauderdale, 46 N. Y. 70; Aspinwall *v*. Torrance, 1 Lans. (N. Y.) 381.]

[2] Blades *v*. Free, 9 B. & Cressw. 167.

fide, will, under such circumstances, be responsible to the other contracting party for any loss or damage sustained thereby. It has been recently held, upon very full consideration, and upon reasoning entirely satisfactory, that the agent will not, under such circumstances, be responsible; upon the ground, that the continuance of the life of the principal must be deemed to be a fact equally within the contemplation of both parties, as the basis of the contract; and, consequently, neither is deceived or misled by the other as to the conditions essential to give it validity. In short, each understands that the contract proceeds upon the presumption, that the principal is still living, and capable of being bound by the contract, and that the agent only stipulates for good faith and the existence of an original authority to make the contract. If, at the time, the agent should *bona fide* say to the other party, I know not whether my principal is dead or living; but, if living, I warrant him bound by the contract; no doubt could be entertained, that, if the principal were dead at the time, and his death were unknown to both parties, the agent would be absolved from all responsibility; for the other party, in such a case, takes the contract *sub modo*, and conditionally. Now, in legal contemplation, there is no distinction between such an express undertaking and an implied engagement to the same effect, virtually understood at the time by both parties, from the very circumstances of the case.[1]

[1] Smout *v.* Ilbery, 10 Mees. & Wels. 1. In this case, a man, who was in the habit of dealing with the plaintiff, for meal supplied to his house, went abroad, leaving his wife and family resident in England, and died abroad. The action was brought against the wife, for meal supplied after the death of the husband, which was unknown to both parties; and it was held, that the wife was not liable. Mr. Baron Alderson, in delivering the opinion of the court, said: "We took time to consider this question, and to examine the authorities on this subject, which is one of some difficulty. The point, how far an agent is personally liable who, having in fact no authority, professes to bind his principal, has on various occasions been discussed. There is no doubt, that, in the case of a fraudulent misrepresentation of his authority, with an intention to deceive, the agent would be personally responsible. But, independently of this, which is perfectly free from doubt, there seem to be still two other classes of cases, in which an agent who, without actual authority, makes a contract in the name of his principal, is personally liable, even where no proof of such fraudulent intention can be given. First, where he has no authority, and knows it, but nevertheless makes the contract, as having such authority. In that case, on the plainest principles of justice, he is liable. For he induces the other party to enter into the contract, on what amounts to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just, that he who does so should be considered as holding himself out as one having

§ 266. In the next place, a person contracting as agent will be personally responsible, where, at the time of making the contract,

competent authority to contract, and as guaranteeing the consequences arising from any want of such authority. But there is a third class, in which the courts have held, that, where a party, making the contract as agent, *bona fide* believes that such authority is vested in him, but he has in fact no such authority, he is still personally liable. In these cases, it is true, the agent is not actuated by any fraudulent motives; nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as before. It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct. And, if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion, should be personally liable for its consequences. On examination of the authorities, we are satisfied that all the cases in which the agent has been held personally responsible, will be found to arrange themselves under one or other of these three classes. In all of them it will be found, that he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated to be true what he did not know to be true; omitting, at the same time, to give such information to the other contracting party as would enable him, equally with himself, to judge as to the authority under which he proposed to act. Of the first, it is not necessary to cite any instance. Polhill *v.* Walter is an instance of the second; and the cases where the agent never had any authority to contract at all, but believed that he had, as when he acted on a forged warrant of attorney, which he thought to be genuine, and the like, are instances of the third class. To these may be added those cited by Mr. Justice Story, in his book on Agency, p. 261, note 3 (§ 264, n. 2). The present case seems to us to be distinguishable from all these authorities. Here the agent had, in fact, full authority originally to contract, and did contract, in the name of the principal. There is no ground for saying, that in representing her authority as continuing, she did any wrong whatever. There was no *mala fides* on her part; no want of due diligence in acquiring knowledge of the revocation; no omission to state any fact within her knowledge relating to it; and the revocation itself was by the act of God. The continuance of the life of the principal was, under these circumstances, a fact equally within the knowledge of both contracting parties. If, then, the true principle derivable from the cases is, that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principal, it will follow, that the agent is not responsible in such a case as the present. And to this conclusion we have come. We were, in the course of the argument, pressed with the difficulty, that, if the defendant be not personally liable, there is no one liable on this contract at all; for Blades *v.* Free has decided, that in such a case the executors of the husband are not liable. This may be so; but we do not think, that, if it be so, it affords to us a sufficient ground for holding the defendant liable. In the ordinary case of a wife, who makes a contract in her husband's lifetime, for which the husband is not liable, the same consequence follows. In that case, as here, no one is liable upon the

he does not disclose the fact of his agency; but he treats with the other party as being himself the principal; for, in such a case, it follows irresistibly, that credit is given to him on account of the contract.[1] Thus, if a factor or broker, or other agent, buy goods in his own name for his principal, he will be responsible to the seller therefor in every case where his agency is not disclosed.[2] But

contract so made. Our judgment, on the present occasion, is founded on general principles, applicable to all agents. But we think it right also to advert to the circumstance that this is the case of a married woman, whose situation as a contracting party is of a peculiar nature. A person who contracts with an ordinary agent, contracts with one capable of contracting in his own name; but he who contracts with a married woman knows that she is in general incapable of making any contract, by which she is personally bound. The contract, therefore, made with the husband by her instrumentality, may be considered as equivalent to one made by the husband exclusively of the agent. Now, if a contract were made on the terms that the agent, having a determinable authority, bound his principal, but expressly stipulated, that he should not be personally liable himself, it seems quite reasonable, that, in the absence of all *mala fides* on the part of the agent, no responsibility should rest upon him. And, as it appears to us, a married woman, situated as the defendant was in this case, may fairly be considered as an agent so stipulating for herself; and on this limited ground, therefore, we think she would not be liable, under such circumstances as these." See Post, § 495; [Randell *v.* Trimen, 18 C. B. 786; Carriger *v.* Whittington, 26 Mo. 313].

[1] Owen *v.* Gooch, 2 Esp. 567; Post, § 291; *Ex parte* Hartop, 12 Ves. 352; Paterson *v.* Gandasequi, 15 East, 62, 68; 3 Chitty on Com. & Manuf. 211; Mauri *v.* Heffernan, 13 John. 58, 77; 2 Liverm. on Agency, 245–247, 257 (ed. 1818); 2 Kent, Comm. Lect. 41, pp. 630, 631 (4th ed.); Stackpole *v.* Arnold, 11 Mass. 27; James *v.* Bixby, 11 Mass. 34, 37, 38; Bedford *v.* Jacobs, 16 Martin, 530; Brockway *v.* Allen, 17 Wend. 40, 43; 2 Kent, Comm. Lect. 41, pp. 629–631 (4th ed.); Hyde *v.* Wolf, 4 Miller (La.), 234; Taintor *v.* Prendergast, 3 Hill, 72; Corlies *v.* Cumming, 6 Cowen, 181; Rathbon *v.* Budlong, 15 John. 1; Waring *v.* Mason, 18 Wend. 425; Mills *v.* Hunt, 20 Wend. 431; Bedford *v.* Jacobs, 4 Miller (La.), 528; Beebe *v.* Roberts, 12 Wend. 413; Raymond *v.* Crown & Eagle Mills, 2 Met. 319; Smith on Merc. Law, pp. 134, 136, 140, 141 (3d ed. 1843); Upton *v.* Gray, 2 Greenl. 373; Keen *v.* Sprague, 8 Greenl. 77; Parker *v.* Donaldson, 2 Watts & Serg. 9. [Thus, where A. as trustee, but not disclosing for whom, took an assignment of a mortgage and note, which was forged by the assignor, and the mortgagor paid the note, and, afterwards discovering it was a forgery, brought suit to recover the amount paid, it was held that he could recover it from A., although A. was really acting for the bank, Welch *v.* Goodwin, 123 Mass. 71; Rushing *v.* Sebree, 12 Bush (Ky.), 198; Winsor *v.* Griggs, 5 Cush. 210; McClellan *v.* Parker, 27 Mo. 162; Wheeler *v.* Reed, 36 Ill. 82; Swansea Shipping Co. *v.* Duncan, 1 Q. B. D. 644: nor can the agent discharge himself in such case by putting the creditor to his election whether to hold the principal after disclosure or the agent; nor can the principal compel the creditor to make such election, Beymer *v.* Bonsall, 79 Pa. St. 298; and see Arfridson *v.* Ladd, 12 Mass. 173. — ED.]

[2] 2 Kent, Comm. Lect. 41, pp. 630, 631 (4th ed.); 3 Chitty on Com. &

we are not therefore to infer, that the principal may not also, when he is afterwards discovered, be liable for the payment of the price of the same goods; for, in many cases of this sort, as we shall hereafter abundantly see, the principal and agent may both be severally liable upon the same contract.[1]

§ 267. The same principle will apply to contracts made by agents, where they are known to be agents, and acting in that character, but the name of their principal is not disclosed; for, until such disclosure, it is impossible to suppose, that the other contracting party is willing to enter into a contract, exonerating the agent, and trusting to an unknown principal, who may be insolvent or incapable of binding himself.[2] Thus where a contract is made with an auctioneer for the purchase of goods at a public sale, and no disclosure is made of the principal on whose behalf the commodity is sold, the auctioneer will be liable to the pur-

Manuf. 211; Smith on Merc. Law, 78, 79 (2d ed.); Id. ch. 5, § 5, pp. 134–136, 140, 141 (3d ed. 1843). [One buying goods for another, in his own name, makes himself personally liable therefor unless he discloses his principal; and it is not sufficient that the seller has the means of ascertaining the principal's name. Cobb *v.* Knapp, 71 N. Y. 621. It is the duty of the agent to disclose his agency and not the duty of the creditor to discover it. Baldwin *v.* Leonard, 39 Vt. 266; Nixon *v.* Downey, 49 Iowa, 166; Dale *v.* Humphrey, 1 El. Bl. & El. 1004; Gillett *v.* Offor, 18 C. B. 913. And a principal is not liable for goods bought by his factor in his own name and charged to the factor by the vendor when he has paid the factor for them. McCullough *v.* Thompson, 45 N. Y. Super. 449. — Ed]

[1] Paterson *v.* Gandasequi, 15 East, 62, 68, 69; Smith on Merc. Law, 78, 79 (2d ed.); Id. ch. 5, § 5, pp. 134–136, 140, 141 (3d ed. 1843); Thompson *v.* Davenport, 9 B. & Cressw. 78, 88; Jones *v.* Littledale, 6 Adolph. & Ellis, 486; Pentz *v.* Stanton, 10 Wend. 271. In Jones *v.* Littledale, 6 Adolph. & Ellis, 490, Lord Denman, speaking on this point, said: " There is no doubt, that evidence is admissible on behalf of one of the contracting parties, to show, that the other was agent only, though contracting in his own name; and so to fix the real principal. But it is clear, that, if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were, or were not, known at the time of the contract, relieve himself from that responsibility." Taintor *v.* Prendergast, 3 Hill, 72; Higgins *v.* Senior, 8 Mees. & Wels. 834; Ante, § 264; Kymer *v.* Suwercropp, 1 Camp. 109; Raymond *v.* Crown & Eagle Mills, 2 Met. 319; Post, §§ 269, 270, 275; Hastings *v.* Lovering, 2 Pick. 221; 2 Kent, Comm. Lect. 41, p. 630 (4th. ed.); [Paige *v.* Stone, 10 Met. 160].

[2] 3 Chitty on Com. & Manuf. 211; Paterson *v.* Gandasequi, 15 East, 62, 68, 69; *Ex parte* Hartop, 12 Ves. 352; Smith on Merc. Law, 78, 79 (2d ed.); Id. ch. 4, § 5, pp. 134–136, 140, 141 (3d ed. 1843); Thomson *v.* Davenport, 9 B. & Cressw. 78, 88; 2 Kent, Comm. Lect. 41, pp. 629–631 (4th ed.); [Winsor *v.* Griggs, 5 Cush. 210; Hutchinson *v.* Tatham, L. R. 8 C. P. 482; Falkenburg *v.* Clark, 11 R. I. 278].

chaser to complete the contract, although from the nature of public sales it is plain that he acts as agent only.[1] So, if the agent should, at the time of the purchase of the goods, acknowledge that he is purchasing for another person, but should not then name him; in such a case he would be held personally liable, although the principal, when discovered, might also be liable for the debt.[2]

[1] Hanson *v.* Roberdeau, Peake, 120; Jones *v.* Littledale, 6 Adolph. & Ellis, 486. [See Gillett *v.* Offor, 18 C. B. 913.]

[2] Thomson *v.* Davenport, 9 B. & Cressw. 78, 88; Smith on Merc. Law, 66, 78, 79 (2d ed.); Id. ch. 5, § 5, pp. 134–136, 140, 141 (3d ed. 1843). In Thomson *v.* Davenport, 9 B. & Cressw. 78, 86, 87, Lord Tenterden said: "I take it to be a general rule, that if a person sells goods (supposing, at the time of the contract, he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal, subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if, at the time of the sale, the seller knows, not only that the person who is nominally dealing with him, is not principal, but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then, according to the cases of Addison *v.* Gandasequi, and Paterson *v.* Gandasequi, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election, at the time when he had the power of choosing between the one and the other. The present is a middle case. At the time of the dealing for the goods, the plaintiffs were informed that M'Kune, who came to them to buy the goods, was dealing for another, that is, that he was an agent, but they were not informed who the principal was. They had not, therefore, at that time, the means of making their election. It is true, that they might, perhaps, have obtained those means, if they had made further inquiry; but they made no further inquiry. Not knowing who the principal really was, they had not the power, at that instant, of making their election. That being so, it seems to me that this middle case falls, in substance and effect, within the first proposition which I have mentioned, the case of a person not known to be an agent; and not within the second, where the buyer is not merely known to be agent, but the name of his principal is also known." Mr. Justice Bayley added: "Where a purchase is made by an agent, the agent does not, of necessity, so contract as to make himself personally liable; but he may do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the justice of the case is, that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller, where he had looked to the responsibility of the agent. But the seller who knows who the principal is, and, instead of debiting that principal, debits the agent, is considered, according to the authorities which have been referred to, as consenting to look

§ 268. It is partly upon this ground, and partly upon the ground of general convenience and the usage of trade, that the general rule obtains, that agents or factors acting for merchants resident in a foreign country (as, for example, in France or Germany) are held personally liable upon all contracts made by them for their employers; and this without any distinction, whether they describe themselves in the contract as agents or not. In such cases, the ordinary presumption is, that credit is given to the agents or factors,[1]

to the agent only, and is thereby precluded from looking to the principal. But there are cases which establish this position, that, although he debits the agent, who has contracted in such a way as to make himself personally liable, yet, unless the seller does something to exonerate the principal, and to say that be will look to the agent only, he is at liberty to look to the principal, when that principal is discovered. In the present case, the seller knew that there was a principal; but there is no authority to show, that mere knowledge that there is a principal destroys the right of the seller to look to that principal, as soon as he knows who that principal is, provided he did not know who he was at the time when the purchase was originally made. It is said, that the seller ought to have asked the name of the principal, and charged him with the price of the goods. By omitting to do so, he might have lost his right to claim payment from the principal had the latter paid the agent, or had the state of the accounts between the principal and the agent been such as to make it unjust that the former should be called upon to make the payment. But, in a case circumstanced as this case is, where it does not appear but that the man who has had the goods, has not paid for them, what is the justice of the case? That he should pay for them to the seller, or to the solvent agent, or to the estate of the insolvent agent, who has made no payment in respect of these goods. The justice of the case is, as it seems to me, all on one side; namely, that the seller shall be paid, and that the buyer (the principal) shall be the person to pay him, provided he has not paid anybody else. Now, upon the evidence, it appears that the defendant had the goods, and has not paid for them, either to M'Kune, or to the present plaintiffs, or to anybody else." [But, where a person signed a receipt for goods, to be forwarded over several railroad lines, and did not disclose for what corporations he acted, nor did the other party know, and there were several routes and companies which would satisfy the description given in the receipt, which was signed "G. W., for the corporations," G. W. was held not liable on said receipt for the loss of the goods, although he was not agent for one of the companies over whose road he sent the goods, and although after their loss he verbally promised to pay for them. Lyon *v.* Williams, 5 Gray, 557; Paige *v.* Stone, 10 Met. 160. — R.]

[1] Buller, N. P. 130; De Gaillon *v.* L'Aigle, 1 Bos. & Pull. 358; Paterson *v.* Gandasequi, 15 East, 62; Thomson *v.* Davenport, 9 B. & Cressw. 78; Smith on Merc. Law, 76, 78 (2d ed.); Id. ch. 5, § 5, pp. 134-136, 140, 141 (3d ed. 1843). In Thomson *v.* Davenport, Lord Tenterden said: "There may be another case, and that is, where a British merchant is buying for a foreigner. According to the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner. In this case, the buyers lived at Dumfries; and a question might have been raised for the consideration of the jury, whether, in consequence of

and not only that credit is given to the agents or factors, but that it is exclusively given them, to the exoneration of their employers.[1]

their living at Dumfries, it may not have been understood among all persons at Liverpool, where there are great dealings with Scotch houses, that the plaintiffs had given credit to M'Kune only, and not to a person living, though not in a foreign country, yet in that part of the king's dominions, which rendered him not amenable to any process of our courts? But, instead of directing the attention of the recorder to any matter of that nature, the point insisted upon by the learned counsel at the trial was, that it ought to have been part of the direction to the jury, that, if they were satisfied the plaintiffs, at the time of the order being given, knew that M'Kune was buying goods for another, even though his principal might not be made known to them, they, by afterwards debiting M'Kune, had elected him for their debtor. The point, made by the defendant's counsel therefore, was, that if the plaintiffs knew that M'Kune was dealing with them as agent, though they did not know the name of the principal, they could not turn round on him. The recorder thought otherwise; he thought that, though they did know that M'Kune was buying as agent, yet, if they did not know who his principal really was, so as to be able to write him down as their debtor, the defendant was liable, and so he left the question to the jury; and I think he did right in so doing." Bayley, J., added: "There may be a course of trade, by which the seller will be confined to the agent, who is buying, and not be at liberty at all to look to the principal. Generally speaking, that is the case, where an agent here buys for a house abroad. There may also have been evidence of a course of trade, applicable to an agent living here, acting for a firm resident in Scotland. But that does not appear to have been made a point in this case, and it is not included in the objection which is now made to the charge of the recorder." See Stackpole *v.* Arnold, 11 Mass. 27; Bradlee *v.* Boston Glass Manufactory, 16 Pick. 347, 350. In Taintor *v.* Prendergast, 3 Hill, 72, 73, Mr. Justice Cowen, in delivering the opinion of the court, said: "It may be admitted, as was urged in the argument, that, whether the principal be considered a foreigner or not, his agent, omitting to disclose his name, would be personally liable to an action. Even in case of a foreign principal, however, I apprehend, it would be too strong to say, that, when discovered, he would not be liable for the price of the commodity purchased by his agent. This may indeed be said, when a clear intent is shown to give an exclusive credit to the agent. I admit, that such intent may be inferred from the custom of trade, where the purchaser is known to live in a foreign country. No custom was shown or pretended in the case at bar; and, where the parties reside in different states under the same confederation, this has been held essentially to exonerate the principal. Thomson *v.* Davenport. 9 B. & Cressw. 78. It will be seen, by this case and others referred to by it, that the usual and decisive indication of an exclusive credit is, where the creditor knows there is a foreign principal, but makes his charge in account against the agent. If the seller be kept in ignorance, that he is selling to an agent or factor, I am not aware of a case which denies a concurrent remedy. On the other hand, I am still in want of an authority, that, where an agent acquires rights in a course of dealing for his principal, whether the latter be foreign or domestic, and his name is kept secret, the principal may not sue

[1] Ibid.; Post, § 400; 2 Kent, Comm. Lect. 41, pp. 630, 631, note (*b*).

Still, however, this presumption is liable to be rebutted, either by proofs that credit was given to both principal and agent, or to the

to enforce those rights. I admit, that the defendant is not, by such form of action, to be cut off from any equities he may have against the agent. So far, the latter is considered as the exclusive principal; but no further. As a general rule, the latter cannot maintain an action in his own name at all; and the exception will be found to arise from cases where he has the rights of bailee, or some other *rights;* not the mere powers of a naked agent." But see 2 Kent, Comm. Lect. 41, p. 631, note (*b*) (4th ed.); Ante, § 155; Kirkpatrick *v.* Stainer, 22 Wend. 244. In this last case, it seems to have been thought by Mr. Senator Verplanck, in the Court of Errors, that the doctrine was stated too strongly in the text of the first edition of this work. I confess myself not satisfied that there was any error in the original text, which propounds the credit, in case of foreigners, to be an exclusive credit to the agent, as a matter of presumption, liable, indeed, to be rebutted; but still a presumption, which is to prevail in the absence of proof of any usage, or contract, to the contrary; and the opinion of the learned chancellor (Walworth) in the same case, fully sustains the position. The very case before the Court of Errors seems to have proceeded, in the court below, upon grounds certainly not very satisfactory; for, assuming the foreign principals, in that case, to have been liable on the contract, it is very difficult to avoid the conclusion, that the agent had, by his mode of making the contract, also incurred a personal liability. Indeed, the case seems irreconcilable with the doctrine laid down in Higgins *v.* Senior, 8 Mees. & Wels. 834, 844; Post, § 270, and note. See also Smith on Merc. Law, ch. 5, § 4, pp. 103–133; Id. § 7, pp. 140, 146 (3d ed. 1843); Post, § 270. In Taintor *v.* Prendergast, 3 Hill, 72, the Supreme Court of New York seems to have acted upon the doctrine, that if an agent of a foreigner makes a contract in his own name, without disclosing the name of his principal, the latter will be bound thereby, and liable thereon, although the agent may also be personally liable. In that case, the contract was made in New York on behalf of the principal living in Connecticut; and it was said, that in such a case, there was no usage or custom of trade to deem it an exclusive credit to the agent. That circumstance may, perhaps, properly distinguish the case from that of a contract made on behalf of a known or unknown principal living in England, or France, or Germany. The same distinction was recognized in Thomson *v.* Davenport, 9 B. & Cressw. 78; and by Mr. Chancellor Walworth, in Kirkpatrick *v.* Stainer, 22 Wend. 254, 255. He there says. "Upon a careful examination of the law on this subject, I have therefore arrived at the conclusion, that there is a well-settled distinction between the personal liability of an agent who contracts for the benefit of a domestic principal, and one who contracts for a principal who is domiciled in a foreign country. I do not think that, by our commercial usage, it is applicable to the case of a principal who is domiciled in another state of the union, as the interests of trade do not seem to require it. Besides, it does not appear to have been applied in England to the case of a principal residing in Scotland; although in the case of Thomson *v.* Davenport, before referred to, Lord Tenterden supposed it might have been a proper subject of inquiry for the jury, whether there was not a usage of trade at Liverpool, to give the credit to the agent where the principal resided in Scotland. So far as the law is settled on the subject, however, it only applies to a principal domiciled in a foreign country, or, in the language of the com-

principal only;[1] or that the usage of trade does not extend to the particular case.[2]

mon law, 'beyond the seas.'" And again: "I see no difficulty in the form of the contract in this case, to bind the principals, and to relieve the agent from personal liability, if they had not been domiciled abroad. It is well settled, that in a commercial contract, not under seal, no particular form of words is necessary to bind the principal. Where the principal is known to the other party, and the contract is formally drawn up and signed by the parties, it should probably appear in some part of the contract that the agent is acting for some person other than himself; as he will be personally liable if he expressly contracts in his own name, without any reference to his character as agent, either in his signature, or in the body of the contract, although he was duly authorized to contract on behalf of his principal. The true rule on this subject, I apprehend to be this, that where it appears from a contract, made by the agent for a domestic principal, that he was such agent, the presumption is that he meant to bind his principal only; unless there is something in the contract from which it can be legally inferred that he meant to bind himself solely, or both himself and his principal, for the performance of the contract. On the contrary, if the contract is made on behalf of his foreign correspondent, who is domiciled abroad, the legal presumption is, that the agent meant to hold himself personally liable for the performance of the contract, unless from the terms of the contract it appears, that he meant to contract upon the credit of his foreign principal exclusively; for the agent, in such a case, may be personally liable on the contract, although the principal is also bound." Mr. Senator Verplanck seems, in his opinion in the same case (pp. 262–264), to have recognized the distinction between foreigners resident in England or France, and citizens resident in another state of this union. Post, § 400. Where credit is given to a foreign principal, who is known, and the agent represents him alone, there is no doubt that the presumption of an exclusive credit to the agent is repelled. Trueman *v.* Loder, 11 Adolph. & Ellis, 589; [Peterson *v.* Ayre, 13 C. B. 353; Smyth *v.* Anderson, 7 C. B. 21].

[1] Ibid.; Post, §§ 290, 350, 400, 423, 448; Trueman *v.* Loder, 11 Adolph. & Ellis, 589, 594, 595.

[2] [But the true rule seems to be that an agent of a foreign principal is not, as a matter of law, personally liable on such contracts, but it is a question of fact for the jury in each case, to be decided by the peculiar circumstances, whether he is liable on the particular contract in each case. This has been so held in England, Green *v.* Kopke, 18 C. B. 549; Wilson *v.* Zulueta, 14 Q. B. 405; Paice *v.* Walker, L. R. 5 Ex. 173; Armstrong *v.* Stokes, L. R. 7 Q. B. 603; Elbinger Co. *v.* Claye, L. R. 8 Q. B. 313; Hutton *v.* Bulloch, L. R. 8 Q. B. 331: and in this country, Oelricks *v.* Ford, 23 How. U. S. 49; Rogers *v.* March, 33 Me. 106; Goldsmith *v.* Manheim, 109 Mass. 187: and where a contract in writing is made by an agent which is in form with the foreign principal and not with the agent, the latter is not liable, although the contract was signed by him "for and on account of" the foreign principal, Mahoney *v.* Kekulé, 14 C. B. 390: and the contract itself may stipulate that the agent shall not be bound, even though the principal is not disclosed, Oglesby *v.* Yglesias, 1 El. Bl. & El. 930; Pederson *v.* Lotinga, 28 L. T. R. 267: or the agent may stipulate that his liability under a charter-party shall cease after a certain time or upon the happening of a certain event, Christoffersen *v.*

§ 269. In the next place, a person contracting as agent will be personally liable, whether he is known to be an agent or not, in all cases where he makes the contract in his own name, or voluntarily incurs a personal responsibility, either express or implied.[1] Thus,

Hansen, L. R. 7 Q. B. 509. So, where a contract was signed "A. B.," who was a foreign principal, "by C. D., agent," the agent was held not to be personally bound thereby. Bray *v.* Kettell, 1 Allen, 80. In that case, Bigelow, C. J., said: "This action is brought to recover damages for a breach of a written contract of affreightment entered into by the defendants in behalf of one Charles D. Archibald, doing business under the name and style of the 'Albert Freestone Quarries,' and executed by signing the same with the business name of their principal by themselves as agents. The only question in the case is, whether the defendants can be held liable on this contract.

"The plaintiff does not controvert the general rule of law, that an agent is not personally responsible upon an instrument executed in the name of his principal. But he rests his claim against the defendants upon the ground that the present case falls within a recognized exception to the rule, because the defendants acted, in making the contract, in behalf of a foreign principal, resident 'beyond seas.' It is certainly true that some of the earlier English cases seem to sanction the doctrine, that where an agent acts for a foreign principal, the presumption is that credit is given exclusively to the agent, and he only is liable on contracts entered into in the name and on behalf of his principal. Gonzales *v.* Sladen, Bull. N. P. 130; De Gaillon *v.* L'Aigle, 1 B. & P. 368; Thomson *v.* Davenport, 9 B. & Cressw. 87; Smyth *v.* Anderson, 7 C. B. 21. The same doctrine is stated in Paley on Agency (4th Amer. ed.), 248; 2 Liverm. on Agency, 249; and especially in Story on Agency, §§ 268, 290, where it is enunciated as a general rule that agents acting for merchants residing in a foreign country are held personally liable on all contracts made by them for their employers, and this without any distinction whether they describe themselves in the contract as agents or not. We are inclined to think that a careful examination of the cases which are cited in support of this supposed rule will show that this statement is altogether too broad and comprehensive. Certain it is, that if it ever was received as a correct exposition of the law, it has been essentially modified by the more recently adjudged cases. The more reasonable and correct doctrine is that, when goods are sold to a domestic agent or a contract is made by him, the fact that he acts for a foreign principal is evidence only that the agent and not the principal is liable. It is in reality, in all cases, a question to whom the credit was in fact given. Where goods are sold, it is certainly reasonable to suppose that the vendor trusted to the credit of a person residing in the same country with himself, subject to laws with which he is familiar, and to process for the immediate enforcement of a debt, rather than to a principal residing abroad, under a different system of laws, and beyond the jurisdiction of the domestic forum. But even in such a case, the fact that the principal is resident in a foreign country is only one circumstance entering into the question of credit and is liable to be controlled by other facts." — Ed.]

[1] Ante, §§ 147, 154, 156–159; 1 Stair, Inst. by Brodie, B. 1, tit. 12, § 16; 3 Chitty on Com. & Manuf. 211; 2 Kent, Comm. Lect. 41, p. 630 (4th ed.); Id. 631; Jones *v.* Littledale, 6 Adolph. & Ellis, 486, 490; Hopkins *v.* Mehaffy,

for example, if an agent should buy goods for his principal, and by a written memorandum should acknowledge, that the purchase was for his principal, and should promise to pay for them, he would be personally liable.[1] So, if an agent selling goods should make out the memorandum of the sale, and the invoice of the goods, as bought of him, the agent, he would be personally liable for a failure to deliver the goods.[2] So, if an agent should retain an attorney for his principal, and should promise to pay him his fees, he would be personally liable.[3] So, if an agent should, in his own name, but on behalf of his principal, enter into an agreement to execute a lease of lands of his principal, he would be held personally responsible for the execution thereof.[4] So, if an agent should, in his own name, draw a bill of exchange on his principal for the debt of the latter, he would be personally responsible, as drawer, in case of the dishonor of the bill, although upon the face of it the bill was drawn on account of his principal.[5] So, if an agent should accept a bill in

11 Serg. & R. 129; Burrell *v.* Jones, 3 B. & Ald. 47; Iveson *v.* Conington, 1 B. & Cressw. 160; Magee *v.* Atkinson, 2 Mees. & Wels. 440; Seaber *v.* Hawkes, 5 Moore & Payne, 549; Kirkpatrick *v.* Stainer, 22 Wend. 244, 254, 255; Taintor *v.* Prendergast, 3 Hill, 72; Simonds *v.* Heard, 23 Pick. 121; Higgins *v.* Senior, 8 Mees. & Wels. 835, 845; Mills *v.* Hunt, 20 Wend. 431; Newhall *v.* Dunlap, 2 Shepley, 180; Waring *v.* Mason, 18 Wend. 425; Collins *v.* Butts, 10 Wend. 399; Post, § 400; [Chandler *v.* Coe, 54 N. H. 561].

[1] Alford *v.* Egglesfield, Dyer, 230 *a*; Talbot *v.* Godbolt, Yelv. 137; 2 Kent, Comm. Lect. 41, pp. 629–631 (4th ed.); Story on Bills of Exchange, § 76.

[2] Jones *v.* Littledale, 6 Adolph. & Ellis, 486; Higgins *v* Senior, 8 Mees. & Wels. 834; Post, § 270.

[3] Harvey *v.* French, Alleyn, 6; [Towle *v.* Hatch, 43 N. H. 270].

[4] Norton *v.* Herron, 1 Carr. & Payne, 648; s. c. 1 Ryan & Mood. 229; Ante, §§ 155–158; [Tanner *v.* Christian, 4 El. & Bl. 591; 29 Eng. Law & Eq. 103; Lennard *v.* Robinson, 32 Eng. Law & Eq. 127; 5 El. & Bl. 125; Cooke *v.* Wilson, 38 Ib. 362; 1 J. Scott, N. S. 153].

[5] Bayley on Bills, ch. 2, § 7 (5th ed.); Leadbitter *v.* Farrow, cited Ib., and 5 M. & Selw. 345; Lefevre *v.* Lloyd, 5 Taunt. 749; Mayhew *v.* Prince, 11 Mass. 54; Eaton *v.* Bell, 5 B. & Ald. 34; Goupy *v.* Harden, 7 Taunt. 159; Ante, §§ 155–157. And it seems, that, in such case, it would make no difference, if he signed his name "A. B., agent," if his principal was not named on the bill. Pentz *v.* Stanton, 10 Wend. 271; Ante, § 155. This also seems to be the rule in the law of the foreign continental nations. Emerigon lays it down that the agent, who contracts in his own name, is bound, notwithstanding his quality of agent is announced; and he cites the passage from the Novels: Si autem dixerit fiet tibi satis aut a me, aut ab illo et illo, &c.; ipsum autem, qui hoc promiserit, integrum quidem debitum cogi persolvere. Novell. 115, cap. 6, § 4; 2 Emerig. Assur. ch. 4, § 12, pp. 466, 467; Ante, § 262, note; Post, § 271; [Heubach *v.* Mollman, 2 Duer, 260; Ridson *v.* Dilworth, 5 Price, 564].

his own name which is drawn on him on account of his principal, he would be personally liable on his acceptance.[1] So, if an agent should sign a note in his own name for the premium due upon a policy of insurance, underwritten for his principal, he would be personally responsible therefor.[2] So, if an agent employed to sell goods for his principal, should draw a bill on the purchaser in favor of his principal for the amount of the sale, he would be held personally liable to the latter, as drawer, upon the dishonor of the bill.[3] So, in such a case, if the agent should remit his own note to the principal for the amount of the sale, he would be liable not only to third persons, but to the principal, for the amount.[4] So, if an agent, employed to purchase bills for his principal, should have them made payable to himself or order, and should then indorse them and remit them to his principal, he would be liable thereon to his principal, as well as to third persons, as

[1] Bayley on Bills, ch. 2, § 7 (5th ed.); Thomas *v.* Bishop, 2 Str. 955; Ante, §§ 155–157, note. The case of Thomas *v.* Bishop, 2 Str. 955, would make one pause, as to the extent to which the doctrine should be carried. There, a bill was drawn on the defendant as follows: "At thirty days' sight, pay to J. S., or order, £200, value received of him, and place the same to account of the York Buildings Company, as per advice from Charles Mildmay. To Mr. Humphrey Bishop, cashier of the York Buildings Company, at their house, in Winchester Street, London." The defendant accepted it as follows: "Accepted, 13th June, 1832, per H. Bishop." The bill being dishonored when due, an action was brought against Bishop, personally; and it was held, that he was personally liable on the acceptance. The only point of doubt is, whether a bill so drawn is not to be deemed as drawn on the cashier officially, and accepted by him officially, and therefore, as excluding a personal responsibility. Suppose a check, drawn on the cashier of a bank, as such, and accepted by him; would he be personally responsible on the acceptance, or would the bank be responsible? Drafts, drawn on, and accepted by, cashiers of banks, are usually treated as official transactions, and binding on the bank, and not merely on the cashier personally. Ante, §§ 155, 159, and note. In Shelton *v.* Darling, 2 Conn. 435, a bill was drawn on an agent, as follows: "A. B., agent of the Commission Company, ninety days after date, please to pay to our order, two thousand dollars, value received, and charge to account. Your obed't serv'ts, D. & C." On which there was an acceptance as follows: "Accepted, A. B., agent, C. C." It was held, that A. B. was not personally liable thereon; although it was proved, that he procured the bill to be drawn, and to be discounted for his own use. See also Mott *v.* Hicks, 1 Cowen, 513, cited Ante, § 159, note; Thomson on Bills of Exchange, pp. 228–230 (2d ed. 1836). [And see Fuller *v.* Hooper, 3 Gray, 341.]

[2] Stackpole *v.* Arnold, 11 Mass. 27.

[3] Lefevre *v.* Lloyd, 5 Taunt. 749; Ante, §§ 156, 157, note.

[4] Simpson *v.* Swan, 3 Camp. 291. But see Sharp *v.* Emmet, 5 Whart. 288; Ante, § 157, and note.

indorser.[1] The reason of each of these cases is the same; that, from the form of the transaction, the agent has become a direct personal party to the contract, and his promise and liability are precisely the same as those of any other person drawing or indorsing or accepting a bill, or signing a note. It is perfectly competent, in point of law, for an agent, in any case, to make himself personally responsible for his principal, or to his principal; and upon the just interpretation of the terms of the foregoing contract, and others of a like nature, such a responsibility is naturally, if not necessarily, implied.[2] But it by no means is to be taken, as a natural or necessary conclusion, that, because the agent is personally bound, therefore the principal is exonerated; for we shall presently see, that both may in many cases be equally bound, if not in form, at least in substance, by the contract, so that a suit may be brought by or against either of them.[3]

[1] Goupy *v.* Harden, 7 Taunt. 159. See Ante, §§ 156, 157; Sharp *v.* Emmet, 5 Whart. 288. [And where an agent makes himself a contracting party in a charter-party, the other party may either sue him or he may sue the principal, when disclosed, whether he knew him at the time or not. Christoffersen *v.* Hansen, L. R. 7 Q. B. 509. And where an agent made and signed an agreement to sell the land of his principal and afterwards his principal changed his mind and declined to sell, the agent was held personally liable for a breach of the contract. Long *v.* Millar, L. R. 4 C. P. D. 450. See Weidner *v.* Hoggett, L. R. 1 C. P. D. 533. So, where an agent to borrow money for his principal gave the lender a receipt for it in his own name. Southard *v.* Sturtevant, 109 Mass. 390; Guernsey *v.* Cook, 117 Mass. 548. — Ed.]

[2] Lefevre *v.* Lloyd, 5 Taunt. 749; Lucas *v.* Groning, 7 Taunt. 164; Goupy *v.* Harden, 7 Taunt. 159; Simpson *v.* Swan, 3 Camp. 291; Ante, §§ 155–158, 161, 162; Thomson on Bills, pp. 228, 270 (2d ed. 1836).

[3] Ante, §§ 161, 162, note; Post, §§ 270, 272–280, 446; Allen *v.* Coit, 6 Hill, 318; Rogers *v.* Coit, 6 Hill, 322. It seems, however, to have been assumed, and in some instances actually decided, that where a contract is made with an agent acting and known as such, he cannot maintain any action thereon, although he is in terms the promisee, but that the suit must be brought in the name of the principal. Gilmore *v.* Pope, 5 Mass. 491; Taunton and South Boston Turnpike *v.* Whiting, 10 Mass. 327, 336, and the cases cited; Post, § 395. Indeed, it has been laid down as a general rule, that, where the agent has no interest in the contract, he cannot sue thereon, although the promise is made to him; but that his principal alone can sue. The Town of Garland *v.* Reynolds, 2 Appleton, 45; Irish *v.* Webster, 5 Greenl. 171; Taintor *v.* Prendergast, 3 Hill, 72; Piggott *v.* Thompson, 3 Bos. & Pull. 147; Gunn *v.* Cantine, 10 John. 387. But it admits of the most serious question, whether this doctrine is maintainable upon principle, or is consistent with many other well-considered authorities. See Post, §§ 394–400; Fisher *v.* Ellis, 3 Pick. 321; Fairfield *v.* Adams, 16 Pick. 381. See also Post, § 394, and cases there cited, and Post, § 396, and cases there cited, which it seems difficult entirely to reconcile with each other.

§ 270. The general doctrine, as to the liability of agents, may be further illustrated in cases, where there is a written contract, purporting to be made between one person, as buyer, and another as seller. Thus, for example, if an invoice, or a sold note, should describe the goods sold, as "bought of A. B.," the agent, as seller, and it should be signed by him, he would be held to be an immediate party to the contract, and liable as such, for the delivery of the goods to the buyer, notwithstanding he might have sold the goods, as the agent of the owner, and have made known that fact to the buyer before or at the time of the sale.[1] For, if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal be or be not known, at the time of the contract, relieve himself from that responsibility. And in the case put, by the very form of the contract, the agent represents himself to be the seller, and thereby, as between himself and the buyer, he binds himself by that representation, as a contracting party.[2] But, although the agent may thus bind himself personally; yet this by no means shows, that the principal may not also be bound, as a party to the contract, through his agent; for there is no doubt, that parol evidence is admissible, on behalf of one of the contracting parties, to show that the other was an agent only in the sale, although contracting in his own name, so as to fix the real principal.[3] It has been well observed, that, in cases of this

[1] Ante, § 269.

[2] Jones *v.* Littledale, 6 Adolph. & Ellis, 486; Ante, §§ 155–161; Higgins *v.* Senior, 8 Mees. & Wels. 844; Magee *v.* Atkinson, 2 Mees. & Wels. 440; [Fleet *v.* Murton, L. R. 7 Q. B. 126. But in Holding *v.* Elliott, 5 H. & N. 117, it was held that a mere invoice is not in itself a contract so as to exclude parol evidence that the vendor named therein is only an agent and not the contracting party. — Ed.]

[3] Jones *v.* Littledale, 6 Adolph. & Ellis, 486; Moore *v.* Clementson, 2 Camp. 22; Ante, §§ 161–163, 269; Post, § 446; Beebe *v.* Roberts, 12 Wend. 413; Higgins *v.* Senior, 8 Mees. & Wels. 440. Mr. Baron Parke, in delivering the opinion of the court in this last case, said: "The question in this case, which was argued before us in the course of the last term, may be stated to be, whether, in an action or an agreement in writing, purporting on the face of it to be made by the defendant, and subscribed by him, for the sale and delivery by him of goods above the value of £10, it is competent for the defendant to discharge himself, on an issue on the plea of non-assumpsit, by proving, that the agreement was really made by him by the authority of, and as agent for, a third person, and that the plaintiff knew those facts at the time when the agreement was made and signed. Upon consideration we think, that it was not; and that the rule for a new trial must be discharged. There is no doubt, that, where such an agreement is made, it is competent to show, that one or

sort, the liability of the principal depends upon the act done; and not merely upon the form in which it is executed. If the agent is

both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract, on the one hand, to, and charge with liability, on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the statute of frauds; and this evidence in no way contradicts the written agreement. It does not deny, that it is binding on those, whom, on the face of it, it purports to bind; but shows, that it also binds another, by reason, that the act of the agent, in signing the agreement, in pursuance of his authority, is, in law, the act of the principal. But, on the other hand, to allow evidence to be given, that the party, who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement; which cannot be done. And this view of the law accords with the decisions, not merely as to bills of exchange, signed by a person, without stating his agency on the face of the bill; but as to other written contracts; namely, the cases of Jones *v.* Littledale, and Magee *v.* Atkinson. It is true, that the case of Jones *v.* Littledale might be supported on the ground that the agent really intended to contract as principal. But Lord Denman, in delivering the judgment of the court, lays down this as a general proposition, 'that, if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility.' And this is also laid down in Story on Agency, § 269. Magee *v.* Atkinson is a direct authority, and cannot be distinguished from this case." Trueman *v.* Loder, 11 Adolph. & Ellis, 589. Mr. Smith, in his Leading Cases, vol. 2, p. 226, note to the case of Thomson *v.* Davenport, says: "The next proposition, above submitted is, that parol evidence, that the person who has signed as principal, was in reality an agent, ought not to be excluded, when the purpose, for which it is offered, is that of charging the principal with the contract. The principle, on which it is submitted, that this depends, is adverted to in the text of Paterson *v.* Gandasequi, which states, that 'it was moved to set aside the nonsuit, on the ground of assimilating this case of a dormant principal to that of a dormant partner, where, though the person, furnishing goods to the ostensible partners, intended, at the time, to give credit only to them, yet he may afterwards pursue his remedy against the dormant partner, when discovered.' And this, it is submitted, is the true principle. A dormant partner is sued on the ground of agency; he is liable on a contract relating to the firm, made in the ostensible partner's name alone, because he is taken to have adopted the name of the ostensible partner as his own, for the purpose of such contracts. So that, when the ostensible partner signs his name to such contracts, he signs a word the meaning of which comprehends not himself alone, but his partner also. It is, in fact, a question of signification. A. and B. trade under the name of 'A.'; the name 'A.,' therefore, when used in a contract relating to such trade, means 'A. & B.'; and to show that it has such meaning, parol evidence is admissible, but admissible only for the purpose of charging B.; for De Mautort *v.* Saunders, 1 B. & Adolph. 398, decides, that it cannot be admitted to discharge the ostensible partner. Now, if B. may contract jointly with A., under the name of A., and employ A. to sign it, there is no reason why he should not contract individually in the same way; and, if he may do so,

clothed with the proper authority, his acts bind the principal, although executed in his own name. The only difference is, that,

then parol evidence must be admissible to show that A., being his agent, so contracted for him. This view will be, it is submitted, borne out by an examination of the authorities. In Paterson *v.* Gandasequi, the order for the goods, for which the action was brought, was in writing, signed only by Larrazabel & Co.; no objection was made to the admissibility of the parol evidence. In Thomson *v.* Davenport, Railton *v.* Peele, and Railton *v.* Hodson, the invoices, which appear to have contained the terms of the contracts, were made out to the respective agents. The case of Short *v.* Spackman, 2 B. & Adolph. 962, has considerable bearing on these points. The plaintiffs, being employed by Hudson to buy oils, employed one Bentley to effect a purchase for them; Bentley applied to the defendants, who refused to sell to the plaintiffs, but, being informed they had a principal, consented, and made out the bought and sold notes to the plaintiffs, as principals. Hudson refused to ratify the purchase, on which the plaintiffs took it for their own benefit, demanded the oils, and brought an action against the defendants for not delivering them. It was objected, that the defendants had expressly refused to deal with the plaintiffs as principals. The form of the written contract (the bought and sold notes) in which they appeared as principals, was, however, held to entitle them to sue; and Parke, J., in his judgment, says: 'It is found, that the plaintiffs were authorized by Hudson to buy oil of the defendants, and the contract was binding both on them, and, if the defendants chose to enforce it, on Hudson.' It is for the above *dictum* of Parke, J., that Short *v.* Spackman is cited; the decision of the case turns, as will be perceived, upon the right of the agent to sue upon the contract in his own name. That an agent, who has made a contract in his own name for an undisclosed principal, may sue on it in his own name, is established by several cases, particularly the late one of Sims *v.* Bond, 5 B. & Adolph. 393. 'It is,' said the Lord Chief Justice, delivering the judgment of the court in that case, after a *cur. adv. vult.*, a 'well-established rule of law, that, where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue on it; the defendant, in the latter case, being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party. This rule is most frequently acted on in sales by factors, agents, or partners, in which cases either the nominal or real contractor may sue. But it may be equally applied to other cases.' See also Alexander *v.* Barker, 2 Tyrwh. 146; Sims *v.* Britain, 4 B. & Adolph. 375; Bastable *v.* Poole, 5 Tyrwh. 111. Now, as far as the admissibility of the parol evidence to qualify the written contract is concerned, there is as much objection to letting it in for the purpose of enabling the principal, not named in the contract itself, to sue, as for the purpose of rendering him liable to be sued. But the true rule, it is submitted, is, that the parol evidence is admissible for the purpose of introducing a new party, but never for that of discharging an apparent party to the contract. See this laid down in Jones *v.* Littledale, 5 Adolph. & Ellis, 486, and, in the judgment of the Court of Exchequer, in Simpson *v.* Higgins, *ubi sup.* The point was mooted, but not decided, in Graham *v.* Mussen, 5 Bing. N. C. 603, where the court held, that the buyer did not, by requesting the seller's agent to write a note of the contract in his (the buyer's) book, constitute him his agent for the purpose of signing his name, so as to render the entry a note in writing within

where the agent contracts in his own name, he adds his own personal responsibility to that of the principal, who has employed him.[1]

§ 271. The Roman law, as we have already seen, carried the responsibility of an agent, contracting in his own name, although for the benefit of his principal, somewhat further; for, in all such contracts, he was, ordinarily, deemed to be the primary and sole contracting party, until the prætor gave the institorial and exercitorial actions.[2] But the modern nations of Europe, which have adopted the Roman law as the basis of their jurisprudence, have followed out the principles of our law, by exempting the agent from liability when he has contracted solely in the name of his principal; and by fixing a personal liability upon him, when, although known and described as an agent, he yet has contracted in his own name.[3]

the statute of frauds." But see Stackpole *v.* Arnold, 11 Mass. 27, 29; Bradlee *v.* Boston Glass Co. 16 Pick. 347; Ante, §§ 147, 154, 155, 160, 161; Post, §§ 275–280; 2 Kent, Comm. Lect. 41. pp. 630, 631 (4th ed.); Hopkins *v.* Lacouture, 4 La. 64; Hays *v.* Lynn, 7 Watts, 524; Muldon *v.* Whitlock, 1 Cowen, 290; Porter *v.* Talcott, 1 Cowen, 359; Waring *v.* Mason, 18 Wend. 425; Mills *v.* Hunt, 20 Wend. 431; Sullivan *v.* Campbell, 2 Hill, 271. It is difficult, if not impracticable, to reconcile the language of all the authorities on this subject, as may be seen in note to Ante, § 147. For example, it was held, in Minard *v.* Reed, 7 Wend. 68, that a note, executed by a wife in her own name, will not bind her husband, if it does not purport to be made for him, either in the body of the note, or in the signature by her as agent, although she has authority from her husband to give notes to bind him. [But the contrary has been held in England, and the husband was held liable, Lindus *v.* Bradwell, 5 C. B. 583. So, where A. has sold an article to B. and given him credit, he can, on discovering that B. only acted as C.'s agent, sue and recover payment from C., Jessup *v.* Steurer, 75 N. Y. 613; Kean *v.* Davis, 1 Spencer, 426; Wilson *v.* Bailey, 1 Handy, Ohio, 177; Higgins *v.* Dellinger, 22 Mo. 399; Spencer *v.* Field, 10 Wend. 87: and where the contracting party, after discovering that the other party was merely an agent for an undisclosed principal, waits and suffers the principal to alter his own position, he will be held to have waived his right of election and cannot hold the principal, Smethurst *v.* Mitchell, 1 El. & E. 622. — Ed.]

[1] Per Mr. Justice Porter, in Hopkins *v.* Lacouture, 4 La. 64; Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326; Hyde *v.* Wolff, 4 La. 234; s. p. Pothier on Oblig. by Evans, n. 82, 447, 448; Bowen *v.* Morris, 2 Taunt. 374, 387; Lisset *v.* Reave, 2 Atk. 394; Beebe *v.* Roberts, 12 Wend, 413; Ante, §§ 160, 161; Higgins *v.* Senior, 8 Mees. & Wels. 844.

[2] Ante, §§ 88, 161–163; Post, §§ 425, 426; Dig. Lib. 14, tit. 1, l. 1; Id. tit. 3, l. 1; Hopkins *v.* Lacouture, 4 La. 64.

[3] Pothier on Oblig. by Evans, n. 74, 75, 82, 447, 448; 1 Emerig. Assur. ch. 5, § 3, p. 137; 1 Stair, Inst. by Brodie, B. 1, tit. 12, § 16; Ersk. Inst. B. 3, tit. 3, §§ 45, 46; 2 Emerig. Assur. ch. 4, § 12, p. 465.

Thus, Emerigon lays down the rule and the exception in the following broad terms: "According to the general rule," says he, "the agent, who promises or stipulates, or acts in his quality or character as agent, is not personally bound (en son nom propre). He is a simple agent or instrument (Il est simple ministre et exécuteur). He is held to nothing more than to exhibit his authority. But, if he contracts in his own name, he is bound, without distinction, to the third person with whom he contracts; because such third person is ignorant of his quality or character, as agent, and he is presumed rather to act for himself than for another. 'Potius meo nomine, quam pro alio.'"[1]

§ 272. One of the most common instances of the application of this doctrine of the personal liability of agents who contract in their own name, and yet avowedly for their employers, is to be found in cases of policies of insurance, procured to be underwritten by agents for their principals. In the common form of such policies, the agent (A. B.), in his own name, causes himself to be insured for his principal (C. D.), or for whom it may concern, &c. In such cases, the agent is deemed an immediate party, although not the sole contracting party. He is liable for the premium; he may sue and be sued on the policy; and the underwriters and himself become reciprocally parties to the policy, and incur the mutual obligations consequent thereon.[2] Emerigon has doubted, whether, upon principle, the agent in such a case, if he acts in his quality of agent, ought to be held personally liable. But he admits that the universal usage is the other way; and that it has the sanction of judicial decisions.[3] It is certainly entirely well settled in the English and American law; and it seems to be a reasonable interpretation of the terms and objects of the instrument.[4]

§ 273. *A fortiori*, the same doctrine applies to cases, where the

[1] Emerig. Assur. Tom. 2, ch. 4, § 12, p. 465; Ante, §§ 262, note, 269, note.

[2] 1 Emerig. Assur. ch. 5, § 4, pp. 139, 140; Marsh. on Insur. B. 1, ch. 8, § 2, pp. 292–296; Id. B. 1, ch. 16, § 2, p. 683; 1 Phillips on Insur. ch. 22, pp. 519, 523, 524; Ante, §§ 109, 111, 161; Post, §§ 394, 498. See Stackpole *v.* Arnold, 11 Mass. 27; 2 Valin, Comm. Liv. 3, tit., 6, art. 3. p. 34; Pothier, Traité d'Assur. n. 96; Garrett *v.* Handley, 4 B. & Cressw. 666, by Bayley, J.

[3] 1 Emerig. ch. 5, § 3, pp. 137, 138; Id. § 4, pp. 139–141; Pothier, Traité d'Assur. n. 96; 2 Valin, Liv. 3, tit. 6, art. 3, pp. 132, 133; 2 Liverm. on Agency, 247, 248, 253, 255 (ed. 1818); Ante, § 269, and notes.

[4] Marsh. on Insur. B. 1, ch. 8, § 2, pp. 292–296; Id. B. 1, ch. 16, § 2, p. 683; 1 Phillips on Insur. ch. 22, pp. 519, 523, 524; 1 Emerig. Assur. ch. 5, § 3, pp. 137, 138; Id. § 4, pp. 139, 140; 2 Emerig. Assur. ch. 4, § 12, p. 467.

instrument is under seal, and purports to be, not the deed of the principal, but the deed of the agent.[1] In such cases, as we have already seen, although the party describes himself as agent of another; yet, as the instrument cannot be deemed the deed of the principal, it would be utterly without any legal effect, unless it was construed to be the deed of the agent;[2] and, therefore, "ut res magis valeat, quam pereat," the interpretation is adopted, that it is the intention of the parties, that the agent shall be bound for the principal; for the law will not impute to the parties an intention to do a void act; much less will it, for such a purpose, allow the words of the instrument to be strained out of the ordinary meaning attached to them. The words, therefore, which touch the character of the agent, are treated as merely words of description, as a mere designation of the person by whose authority and for whose benefit he is acting; and not as intended to exclude a personal responsibility. In this way the whole instrument may have a sensible effect according to the import of the words in their ordinary signification and connection.[3]

[1] Ante, §§ 147–150, 155–157, 161; Post, §§ 276–278, 422, 450; Meyer *v.* Barker, 6 Binn. 228, 234; Stone *v.* Wood, 7 Cowen, 453; [Briggs *v.* Partridge, 39 N. Y. Super. 339].

[2] Ante, §§ 147–150, 152, 154–156; Post, §§ 277, 278. [But a principal cannot sue on a contract under seal made by his agent in his own name. Pickering's Claim, L. R. 6 Ch. 525. And where agents contracted for a company, but under their own names and seals, they were held to be individually liable on the covenants contained in the contract. Quigley *v.* De Haas, 82 Pa. St. 267. So, an executory contract under seal for the purchase of lands, executed by an agent in his own name, cannot be enforced as the simple contract of another party who is not mentioned in the contract, but who was, in fact, the real owner of the land, and who had authorized the agent to make the contract. Briggs *v.* Partridge, 64 N. Y. 357. And where A., purporting to act as the agent of the proprietors of an academy, makes a deed in which he was so named as grantor, and which he signed and sealed in his own name, it was held to be his deed, and he was held personally liable on the covenants therein contained. Snow *v.* Orleans, 126 Mass. 453. — Ed.]

[3] Ante, §§ 148–158, 161, 266–269; Post, §§ 280, 281; Appleton *v.* Binks, 5 East, 148; Abbott on Shipp. Pt. 3, ch. 1, § 2; Duvall *v.* Craig, 2 Wheat. 45; 3 Chitty on Com. & Manuf. 211, 212; Kennedy *v.* Gouveia, 3 Dow. & Ryl. 503; White *v.* Skinner, 13 John. 307; Sumner *v.* Williams, 8 Mass. 198; Stone *v.* Wood, 7 Cowen, 453; Tippets *v.* Walker, 4 Mass. 595; Meyer *v.* Barker, 6 Binn. 234. In Hopkins *v.* Mehaffy, 11 Serg. & R. 126, 129, there was a sealed agreement, purporting to be between a corporation, by its corporate name, of the one part, and the plaintiff, of the other part; it was signed by the president of the corporation, with his own seal, and the president was afterwards sued thereon. The court held him not personally liable on the instrument, even if he had not authority to execute it for the corporation.

§ 274. In the preceding cases, the agent is held personally liable upon the contract, because he is a direct party to it, although he

On that occasion Mr. Justice Gibson, in delivering the opinion of the court, said: "In general, it is true, that there is a distinction between contracts, that are entered into on the part of government by its agents, and those which are entered into on the part of individuals, or corporations, by those who represent them. In respect of the first, it may safely be asserted, that, whether the contract be by parol, or by deed, the public faith is exclusively relied on, whenever the agent does not specially render himself liable. In respect of the second, where the contract is by parol, the agent is liable only where he had no authority to bind his principal; but the agent of an individual or corporation, covenanting, under his seal, for the act of his principal, although he describe himself as contracting for and on behalf of his principal, is liable on his express covenant, whether he had the authority of the person whom he thus professes to bind, or not. The law is thus broadly laid down by Mr. Chitty, in his Treatise on Pleading, page 24, and the authorities which he cites, fully bear him out; to which may be added Tippets *v.* Walker, 4 Mass. 595. It is somewhat remarkable, that the distinction between a parol and a sealed contract was not taken in Randall *v.* Van Vechten, 19 John. 60, and that the authorities cited to prove that an agent, who personally covenants in behalf of his principal, is liable only in the event of there being no recourse to the principal, directly prove the reverse. There is a class of cases referred to, which have nothing to do with the question. I mean those cases where the defendant undertakes to covenant for others, as well as himself; and there it is settled, that if he has no authority to bind the others, he is nevertheless bound himself; not that he incurs an eventual liability, in consequence of the others being discharged, but he remains bound as he was originally, the instrument being his several deed. It is unnecessary, therefore, to inquire whether the plaintiff might have an action of assumpsit against the principal, in consequence of the existence of a parol authority to the agent to enter into the contract, because, whether he may or not, the agent is liable on his express covenant. But there is a striking and substantial difference between the covenant of an agent, who describes himself as contracting for his principal, and the covenant of a principal, through the means and by the instrumentality of an agent. The first is the individual covenant of the agent, the second is the individual covenant of the principal; and, in this respect, the case at bar differs from Randall *v.* Van Vechten, in which the distinction seems not to have been adverted to. No decision can be found in support of the position, that what appears on the face of the deed to be the proper covenant of the principal, but entered into through the agency of an attorney (which, by the by, is the legitimate form of the instrument, where the attorney is not to be bound), shall be taken to be the proper covenant of the attorney, wherever he had not authority to execute the deed. How could he be declared against? If, in the usual and proper manner of pleading, it were alleged, that the agent had covenanted, it would appear by the production of the instrument, that he had not, but that his principal had covenanted through his means; which, on *non est factum* being pleaded, would be fatal. This is precisely the case before us, except that it is not quite so strong. In the body of the instrument the covenants are stated, as if they were made by the corporation directly with the plaintiff, without the agency of any one, the defendant not being named,

is acting for his employer; and the contract is treated as his own express contract. But the liability of an agent may also arise, by implication, from his own acts, with reference to a written contract, to which he is not originally a party. By the common form of a bill of lading, the goods are deliverable to the consignee, or his assigns, or to the shipper, or his assigns, he or they paying freight therefor; and upon the construction of the instrument, it has been held, that whoever receives the goods under the bill of lading, as consignee, or assignee, contracts by implication to pay the freight due on them.[1] Therefore, if the shipper, or the consignee, in such a case, should indorse the bill of lading to his agent, whether known to be an agent or not, the latter would be liable to pay the freight, if he took the goods upon the consignment under the bill of lading;[2] unless, indeed, it should appear upon the face of the consignment or indorsement, that it was made to him as agent merely, or the other circumstances of the case should show that no credit was given to him for the freight.[3]

but merely signing and sealing it with his own seal, as the deed of the corporation, which, I readily admit, it is not. Now, to avoid the difficulty, which I have just mentioned, the plaintiff, in declaring, does not, in the usual way, set forth the substance of the covenants, but alleges that, by certain articles of agreement between the parties, it was covenanted 'as follows;' and then sets out the articles according to their tenor, assigning for breach, that the defendant had not paid, &c. A demurrer would unquestionably have answered the purpose as well as the plea of *non est factum;* for the declaration sets forth no covenant of the defendant, and consequently no cause of action. But the paper is not the defendant's deed. He sealed and delivered it, undoubtedly; but there is something more than sealing and delivery necessary to a deed. It ought to contain the proper parts of a contract; and in this instrument there are no obligatory words, applicable to the person of the defendant. Even the sealing and delivery were (by the party) as the president, and in behalf of the corporation. If the defendant had authority to contract for the corporation, although he has done so informally, there cannot be a doubt that, as the work has been done, the plaintiff may have an action of some sort against it. But he never treated on the basis of the defendant being personally answerable; and to permit him to maintain this action, would permit him to have, what was not in the contemplation of either party, recourse to the person of the agent. I am, therefore, of opinion, that the Judge who tried the cause, was right in directing the jury, that the paper, given in evidence, was not the deed of the defendant." Ante, § 154, and note.

[1] Cock *v.* Taylor, 13 East, 399; Dougal *v.* Kemble, 3 Bing. 386; Abbott on Shipp. Pt. 3, ch. 7, § 4, p. 285 (ed. 1829); Wilson *v.* Keymer, 1 M. & Selw. 157.

[2] Ibid.; Bell *v.* Kymer, 5 Taunt. 477; Evans *v.* Marlett, or Martel, 3 Salk. 290; Post, § 895, and note.

[3] It is not easy, perhaps, to reconcile the language of all the cases on this

§ 274 *a*. But although, in general, an agent who contracts in writing in his own name, even avowedly as agent of another, is thus

point. Cock *v*. Taylor, 13 East, 399, shows, that a purchaser, under the bill of lading from the consignee, is liable for the freight; and Wilson *v*. Keymer, 1 M. & Selw. 157, and Bell *v*. Kymer, 5 Taunt. 477, and Dougall *v*. Kemble, 3 Bing. 383, that an agent, consignee, or indorsee, is also liable, if the bill of lading contains a consignment, or indorsement to him generally, without saying, that he is agent. In this last case, Mr. Chief Justice Best said: "It has been insisted on the part of the defendants, that the verdict of the plaintiff is inconsistent with the law of England, because the contract, on the bill of lading, is with the shipper, or Le Cointe & Co., and that the liability of these parties cannot be transferred to the defendants. But this argument is founded on an inaccurate statement of the terms of the bills of lading. Neither the shipper, nor Le Cointe & Co., agree by these instruments to pay the freight. These are receipts for the goods, with an undertaking, on the part of the captain, that he will deliver them to the legal holder of these bills, on such holder's paying the freight. The captain has a lien for the freight against whoever shall become the owner of the goods. The owner could not compel the captain to deliver the goods from his actual possession, without paying the freight. The act for regulating the West India Docks continues the lien for freight, whilst goods, delivered from a ship, and liable to freight, remain in those docks. Whoever obtains the delivery of goods, under such a bill of lading, contracts, by implication, to pay the freight due on them. There is no assignment of contract, no shifting of liability. The receiver of the goods is an original contractor to pay the freight on them. With respect to the alleged hardship on brokers, they know the terms of the bill under which they claim; they know what freight is due, and they need not make advances beyond the value of the goods, subject to freight. The hardship on the ship-owner would be much greater, if, after having brought the goods to England, he should not be entitled to recover freight from the parties who possess them under the bill of lading. Cock *v*. Taylor is expressly in point for the plaintiff. It has been attempted to distinguish that case from the present by the circumstance, that the plaintiff, in that case, had made no application to the consignee before applying to the defendant, and that the defendant was there a purchaser of the bill of lading. With respect to the application to the consignees, it was made, when the plaintiff supposed them to be the holders of the bills of lading. The moment the plaintiff discovered that the bills of lading had been transferred to the defendants, he applied also to them; and a man is not bound by what he does, in ignorance of the actual circumstances of his case. As to the circumstance of the defendant in Cock *v*. Taylor being a purchaser of the bill of lading, the effect of that is got rid of by Bell *v*. Kymer, in which the defendant was only a broker, and in which Gibbs, C. J., said: 'The holders of a bill of lading were bound to know that they were liable for the freight.' That decision is not touched by any subsequent case, for Wilson *v*. Keymer turned on a different point, and every Judge, in that case, confirmed the decision in Cock *v*. Taylor. In Wilson *v*. Keymer the defendants did not obtain the goods under the bill of lading, but under the order of the consignees. In Moorson *v*. Kymer, the inference of an implied contract was repelled by the existence of a special contract under a charter-party; and Le Blanc, J., said: 'The law will not raise an implied promise, where there is an express agreement between the parties.' But he also said: 'Where

personally responsible upon the agreement so made by him, whether it be under seal or not; and it will be treated as his personal obliga-

the ship is a general ship, and there is no other to whom the party can resort, the law will imply a promise to prevent a failure of justice.' There would be a failure of justice, if such a promise were not implied in the present instance." See also Scaife *v.* Tobin, 3 B. & Adolph. 523; Coleman *v.* Lambert, 5 Mees. & Wels. 502; Tobin *v.* Crawford, Id. 235. In the case of Amos *v.* Temperley, 8 Mees. & Wels. 798, where, by the bill of lading, the goods were "deliverable to A. for the London Gas Company, or his assigns, *he or they paying freight* for the said goods," and A. received the goods under the bill of lading, it was held that A., was not personally liable for the freight; inasmuch as, on the face of the bill of lading, he was a mere agent to receive the goods for the company, the property vesting in them. On that occasion, Mr. Baron Parke, in delivering the opinion of the court, said: "The case of Cock *v.* Taylor established the proposition, that the receipt of goods by the indorsee of a bill of lading, by which they were made deliverable to the consignee or his assigns, he or they paying the freight, was evidence of a new contract between him and the ship-owner to pay the freight according to the terms of the bill of lading; and that case has been followed by many others. But here the defendant is, on the face of the bill of lading, a mere agent, to receive the goods, the London Gas Company being the consignees, and the property vesting in them, according to the rule laid down by Lord Holt, in the case of Evans *v.* Marlett; and the promise to be inferred from the receipt of the goods, under such a bill of lading, is *prima facie* a promise by the defendant, as agent for the company, to pay the freight on their account, and not a promise to be personally responsible for it; and there was no sufficient evidence to the contrary." It is difficult to reconcile this decision with the language of Lord Tenterden, in Drew *v.* Bird, Mood. & Malk. 156, and Renteria *v.* Ruding, Mood. & Malk. 511. The real question in Amos *v.* Temperley, 8 Mees. & Wels. 798, was, whether credit was given to A., the agent, or not, for the freight. Now the goods were deliverable to him, for the gas company, but *he*, or his assigns, were to pay the freight, by the terms of the bill of lading. Why then was not A. directly liable for freight, according to the terms of the bill of lading? He had not assigned it. It by no means followed, that, because the London Gas Company might be liable for the freight, therefore A. was not. Both might be liable. Ante, § 270, and note. In Abbott on Shipp. Pt. 3, ch. 7, § 4, it is said: "If a person accepts any thing, which he knows to be subject to a duty or charge, it is rational to conclude that he means to take the duty or charge on himself." See Ante, § 263, note; Post, § 395. See, as to when a consignment vests the property in an agent, who is under liabilities or has made advances, Holbrook *v.* Wight, 24 Wend. 169; Haille *v.* Smith, 1 Bos. & Pull. 563; Ante, § 111; Abbott on Shipp. Pt. 3, ch. 2, § 4, note 1, p. 216 (Amer. ed. 1829); Dunlap *v.* Lambert, 6 Clark & F. 600, 625, 627. See Post, § 395, and note. [A mere consignment to an agent does not make him liable for freight when his agency is known and there is no stipulation that the consignee shall pay freight. Boston & Me. R. R. Co. *v.* Whitcher, 1 Allen, 497. Nor is a consignee liable for the payment of duties on goods burned in a public store, which were sent there because they were not claimed by the importer or consignee; and one cannot be made a consignee if he chooses to renounce that character and refuses to have any thing to do with the goods. Du Peirat *v.*

tion and contract; yet it does not necessarily follow, that if the principal is not bound thereby, the covenant or contract can in all cases be enforced by or against the agent personally. For if, from the nature and objects of the agreement, whether under seal or not, it can be collected, that a reciprocal obligation is intended to be created, and yet, under the circumstances, it cannot be enforced; or if there is a total failure of the consideration on one side, and the other side cannot maintain any action thereon; there, the agreement will be treated as utterly void. Thus, for example, if an agent should in his own name, and as attorney of his principal, demise an estate of his principal for a term of years, at a specified rent, and the lessee should covenant to pay the rent; there, inasmuch as the demise would be utterly void, as the lease is not executed in the name of the principal, the agent could not maintain a suit for the rent on the covenant, because the whole instrument, including the covenant, would be deemed void, and the consideration for the covenant would totally fail.[1] Neither, for the like reason, could the lessee maintain a suit on any covenant in the lease in his own favor. The same rule has been applied to the case, where an agent made an agreement under seal, as attorney of his principal, whereby, in consideration of a certain sum, he agreed to execute a good and sufficient conveyance in the law, of a certain farm of his principal; and the agent brought a suit to recover the consideration-money; and it was held unmaintainable, because the agreement was considered as made by and with the agent in his own name, as attorney, and not in the name of his principal, and then the whole agreement deemed void, since the agent had no estate in the farm to convey.[2] If, however, the agreement had been by the agent, not that he would convey, but that his principal should convey, then it seems that the agreement would have been valid.[3]

Wolfe, 29 N. Y. 436. But a consignee of a cargo cannot escape liability for demurrage by giving notice to the ship captain on his arrival that the cargo was ordered for an undisclosed principal. Falkenberg *v.* Clark, 11 R. I. 278. — Ed.]

[1] Frontin *v.* Small, 2 Ld. Raym. 1418; s. c. 2 Strange, 705; Berkeley *v.* Hardy, 5 B. & Cressw. 355; Townsend *v.* Hubbard, 4 Hill (N. Y.), 351, 358.

[2] Bogart *v.* De Bussy, 6 John. 94.

[3] Spencer *v.* Field, 10 Wend. 87. Some doubt may well be entertained whether the case of Bogart *v.* De Bussy, 6 John. 94, was a correct application of the principle of the case of Frontin *v.* Small, 2 Ld. Raym. 1418. The latter was an executed lease in the name of the agent, and passed no estate. The former was an executory agreement, under seal, in which the covenant was, on the part of the agent, "to execute a good and sufficient conveyance in the

§ 274 *b*. Another class of cases may readily be suggested, where, from the defective mode of executing the instrument, the principal is not bound, and yet, neither is the agent bound; and that is, where, although the agent is capable of acting for the principal, he or she is incapacitated from binding himself or herself by a personal contract. Thus, for example, if a husband should authorize his wife to sign notes on his account, it is indispensable, in order to bind him, that the notes should, either in the body thereof, or in the signature, purport to be his notes, or on his account; for notes, given in her own name, would not, in such a case, bind either the husband, or the wife.[1] Similar considerations will apply to an agent, who is an infant. In short, in all cases, in order to bind the principal upon the instrument, there must be apt words to charge him; and, in like manner, if the principal is not bound by the instrument, the agent will not be bound thereby, unless it contains apt words also to charge him; although, if he be of competent capacity to enter into a contract, he may be responsible in an action upon the case for his negligent performance of his duty, or his improper assumption of authority.[2]

§ 275. In a great variety of cases, even where the contract is in writing, it becomes a nice question, whether the agent is, or is not, personally bound.[3] Some of the cases on this subject have been already cited;[4] and it is difficult, perhaps impossible, to reconcile all the authorities, bearing on the point. Ordinarily, as we have seen, if the contract is made in such a manner as directly to bind the principal, the agent will not be bound personally.[5] But the embarrassing question still remains, whether the form of the instrument does, or does not, import a personal liability on the part of the agent. Thus, if an agent should make a note, in which he should say, "I promise to pay," &c., and sign it "A. B., for C. D." (the

law" of the farm of his principal, which covenant could properly be performed by a conveyance in the name of his principal, under due authority. The pleadings, upon which the case was decided, did not raise any question as to the form of the conveyance, which was to be made; but turned upon a collateral mortgage on the estate.

[1] Minard *v.* Mead, 7 Wend. 68; Ante, § 264, note.

[2] Stetson *v.* Patten, 2 Greenl. 358; Ante, § 264, note.

[3] Smith on Merc. Law, 79, 80 (2d ed.); Id. pp. 140–143 (3d ed. 1843); Bowen *v.* Morris, 2 Taunt. 374; Denton *v.* Rodie, 3 Camp. 493; Norton *v.* Herron, 1 Carr. & Payne, 648; s. c. 1 Ry. & Mood. 229; Kendray *v.* Hodgson, 5 Esp. 228.

[4] Ante, §§ 154, 155, 158, 269, 270.

[5] Ante, §§ 263, 269; Mann *v.* Chandler, 9 Mass. 335.

principal), the question would arise, whether he was personally bound, or not, upon the instrument in that form.[1] We have already seen, that it has been held, that in such a case, he is not personally bound, if he has authority to sign the note from C. D.[2] The construction might, perhaps, be more doubtful, if the note were, "I, A. B., as agent of C. D., promise," &c., and it were signed, "A. B." And, if in the latter case the note were under seal, there would be strong ground to say, that it was the deed of the agent, and not of the principal.[3]

§ 275 *a*. Similar difficulties have occurred in the application of the same doctrine in the Scottish courts, although they are professedly governed by the same general principle which regulates the doctrine maintained in England and America. Thus, in one case, where the agent of a company, having drawn bills in his own name, discounted them, when accepted, with a bank (the acceptor, who happened to be debtor of the company, having also been informed in a letter to him from the drawer, that the bills in question would be placed to his credit with them), the Court of Sessions found the company liable in an action on the bills, on the ground, that the drawer had drawn and discounted the bills as their agent and for their behoof. But the judgment has been reversed on appeal, and the reversal appears to be conformable with the doctrine now stated. The circumstance of the funds, raised by discounting the bills, being applied to the company's use, was a matter between them and their agents, with which the discounters had no concern. In a later case, certain trustees were found liable for the amount of a promissory note, which the manager of a coal-work forming part of the trust, had granted in his own name. But this was found, not in an action on the bill, but in an action brought on the authority alleged to be given by the trustees, both directly and *rebus et factis*, to sign bills on their account in the business of the trust.[4]

[1] See Rice *v.* Gove, 22 Pick. 158; Woodes *v.* Dennet, 9 N. H. 55; Ante, §§ 154, 155, 161; Post, §§ 275 *a*–279.

[2] Ante, §§ 154, 155; Ballou *v.* Talbot, 16 Mass. 461.

[3] See Dubois *v.* Delaware & Hudson Canal Co. 4 Wend. 285; Ante §§ 147–155; Appleton *v.* Binks, 5 East, 148. [And where an instrument was signed, "D., agent for Ward 6, Lowell," it was held a question for the jury whether it was to be treated as the personal contract of D., and that was to be decided by a consideration of the circumstances of the case. Shattuck *v.* Eastman, 12 Allen, 369. See Packard *v.* Nye, 2 Met. 47; Fullam *v.* West Brookfield, 9 Allen, 1; Chipman *v.* Foster, 119 Mass. 189; Shoe & Leather National Bank *v.* Dix, 123 Mass. 148. — Ed.]

[4] Thomson on Bills, pp. 218, 219 (ed. 1837).

§ 276. Other illustrations of the difficulties, growing out of the interpretations of particular instruments, may be derived from adjudged cases. Thus, where a contract under seal was made between A. B., as agent of C. D., of the one part, and E. F., of the other part, and it was signed and sealed A. B., and E. F.; it was held to be the deed of A. B., the agent; and that he was personally responsible on the covenant.[1] So, where a sealed agreement purported to be by and between the plaintiffs, of the one part, and A. B., C. D., and E. F., directors of the G. Cotton Manufactory, of the other part, and it was signed, "for the directors, A. B.;" it was held to be personally obligatory upon A. B., although he by plea averred, that it was made by himself and the other directors, as agents only of the company.[2] So, where A., B., and C. made a note as follows: "We, the subscribers, jointly and severally, promise to pay D., or order, for the Boston Glass Manufactory," and signed their names, not saying, as agents, it was held, that the note bound them personally, and not the corporation.[3] So, where two persons made a promissory note in this form: "We the subscribers, trustees for the proprietors of the new Congregational meeting-house at A., promise to pay B. the sum of," &c., and signed it C., D., E., F.; it was held that the note bound them personally, and not the proprietors.[4] So, where the committee of a town made a contract in the following words: "Agreement between A., B., and C., committee of the town of N., of the one part, and D. and E. of the other part, and the said committee agree to pay," &c., signing their own names, A., B., and C.; it was held, that they were personally liable on the contract.[5] So, where a committee of the directors of a turnpike corporation entered into a contract under seal, describing themselves as such committee, on the one part, with the plaintiff, on the other part, and signed and sealed the

[1] Stone *v.* Wood, 7 Cowen, 453; Taft *v.* Brewster, 9 John. 334; Hall *v.* Bainbridge, 1 Mann. & Gr. 42; Ante, §§ 158, 273; Post, § 278, and note.

[2] White *v.* Skinner, 18 John. 307; Ante, § 273; [Quigley *v.* De Haas, 82 Pa. St. 267].

[3] Bradlee *v.* Boston Glass Manufactory, 16 Pick. 347. In this case, Mr. Chief Justice Shaw said: "It is held in many cases, that, although the contract of one is given for the debt of another, and although it is understood, between the persons promising, and the party for whom the contract is entered into, that the latter is to pay it, or to reimburse and indemnify the contracting party, if he should be required to pay it, it is still, as between the parties to it, the contract of the party making it. A leading and decisive case on this point is Stackpole *v.* Arnold, 11 Mass. 27." See Ante, §§ 154, 155.

[4] Packard *v.* Nye, 2 Met. 47.

[5] Simonds *v.* Heard, 23 Pick. 121. [See Savage *v.* Rix, 9 N. H. 263.]

contract in their own names, it was held, that they were personally responsible; for it was the deed of the committee, and not of the directors, or of the corporation.[1] So, where certain persons signed a note, describing themselves as "Trustees of Union Religious Society," it was held, that they were personally liable thereon, although it was proved, that the society was a corporation, and the note was given for a balance due from the society for a church bell.[2]

§ 277. In the two last cases, it did not appear, that the agents executing the contract had due authority from the directors or corporation to execute the deeds. If such an authority had been proved or admitted, it would still have remained a question, whether, as the deeds were executed in their own names, they would not have been personally bound. This last question has, however, arisen; and it has been decided in America, that the agents are not affected by any personal responsibility under such a contract, although it is made under their own seals, if the corporation itself has conferred on them a due authority to make the contract on their behalf. Thus, where a contract was made by certain persons, by name, purporting to be "a committee of the corporation of the city of Albany," on the one part, and the plaintiff, on the other part; and it was sealed by the committee with their own seals; it was held, that they were not personally bound by the contract, as it was authorized by the corporation, although not under its corporate seal; and that the corporation was alone liable on the contract in an action of assumpsit.[3] The ground of this decision seems to have been, that, although the corporation was not a direct party to the contract, yet, as the contract had been duly authorized by the corporation, the agents were not personally liable; for (it was said) the

[1] Tippetts *v.* Walker, 4 Mass. 595.

[2] Hills *v.* Bannister, 8 Cowen, 31; Ante, § 154; Shelton *v.* Darling, 2 Conn. 435; Barker *v.* Mechanic Fire Ins. Co. 3 Wend. 94. But see Mann *v.* Chandler, 9 Mass. 335; Mott *v.* Hicks, 1 Cowen, 513; Ante, § 154; Cooch *v.* Goodman, 2 Adolph. & Ellis, New R. 580, 595, 596; [Fiske *v.* Eldridge, 12 Gray, 474; Haverhill Mut. Ins. Co. *v.* Newhall, 1 Allen, 130 (1861); Fogg *v.* Virgin, 19 Me. 352; Cleveland *v.* Steward, 3 Kelley, 283; Trask *v.* Roberts, 1 B. Monr. 201; Webb *v.* Burke, 5 Id. 51; Leach *v.* Blad, 8 Sm. & M. 221].

[3] Randall *v.* Van Vechten, 19 John. 60; Dubois *v.* The Delaware and Hudson Canal Co. 4 Wend. 285; Brockway *v.* Allen, 17 Wend. 40. But see Hopkins *v.* Mehaffy, 11 Serg. & R. 128, 129; Ante, §§ 154, 159, note, 273, note, and Post, § 278, and note. The case of Randall *v.* Van Vechten, 19 John. 60, was distinguished by the court from the case of a public agent of the government, upon the ground that the city of Albany was a private, although a political corporation. But see Hatch *v.* Barr, 1 Hamm. 390, 394.

person who assumes to contract as agent for an individual or for a corporation, must see to it that his principal is legally bound by his act. For, if he does not give a right of action against his principal, the law holds him personally liable.[1] But in this case, as the agents made the contract with due authority, the court held, that, although no action lay upon the deed as the deed of the corporation, yet an action of assumpsit would lie against the corporation, founded upon the obligations contained therein.

§ 278. But it deserves consideration, whether the doctrine can be generally maintained, that, because the principal may be indirectly liable on the contract, therefore the agent is exonerated from all personal responsibility. Besides, it is manifest, that the agents had here made a contract in their own names, although as a committee of the corporation; and the deed was their own deed, and not that of the corporation.[2] The corporation, confessedly, could not be sued on that instrument as their deed; and it would seem to be a general rule, that an agent who executes an instrument, must execute it in the name of the principal, so as to give a right of action thereon against him, if he would avoid personal responsibility; and, if it be a contract by deed, then it must be in the name, and be the deed, of the principal; for, if it be the deed of the agent, he alone is responsible thereon, as the proper legal party to it.[3] In the common case of a charter-party, executed by the master of the ship, according to his ordinary rights and duties, and authority in the proper employment of the ship, it is not doubted, that his owner is bound by the contract in some form of action. But it is as little doubted, that the owner cannot be sued on that very instrument as his deed; and that the master may be sued on it, as his own deed.[4] In short, in such a case, the contract is treated as the direct contract of the master; and the owner is only secondarily liable, in another form of action (an action on the case), and not in an action on the deed itself.[5] Indeed, nothing is more common than for a contract to be

[1] Randall *v.* Van Vechten, 19 John. 60; Dubois *v.* The Delaware and Hudson Canal Co. 4 Wend. 285; Brockway *v.* Allen, 17 Wend. 40. But see Hopkins *v.* Mehaffy, 11 Serg. & R. 128, 129; Ante, §§ 161, and note, 273, note.

[2] See Damon *v.* Inhabitants of Granby, 2 Pick. 345; Ante, §§ 273, 276, 277.

[3] Stone *v.* Wood, 7 Cowen, 453; Ante, §§ 155, 156, 158, 264, note, 269, 270, 273, 274 *a*, 274 *b*.

[4] Ante, §§ 155, 158, 161, 162, 273 and note, 274 *a*, 274 *b*: Post, §§ 279, 294.

[5] Abbott on Shipp. Pt. 2, ch. 2, § 5, pp. 93, 94; Id. Pt. 3, ch. 1, § 2, pp. 163,

made by which the agent is personally bound, and which yet is, *ex consequenti*, binding on the principal also, although the latter is not a direct and immediate party to the instrument.[1] This is true, not only in the commercial law of England and America, but also in that of the foreign nations of continental Europe.[2] The more correct and satisfactory doctrine would seem to be, that, where the agent is a direct party of the instrument, and the principal is not, so that the latter is not, *ex directo*, suable thereon, there the agent, although he describes himself as agent, is suable upon the covenants and agreements contained therein as his own personal contract.[3] Still,

164 (ed. 1829); Stone *v.* Wood, 7 Cowen, 483; Ante, §§ 158, 160–162; Post, §§ 294, 422, 450, note.

[1] Ibid.

[2] Post, § 294. See 1 Emerig. Assur. ch. 5, § 3, pp. 137, 138; Id. § 4, pp. 139, 140; Pothier, Oblig. n. 448; 1 Stair, Instit. by Brodie, B. 1, tit. 12, § 17; Ersk. Inst. B. 3, tit. 3, §§ 43, 46.

[3] Ante, §§ 160, 273, 275. The cases of Randall *v.* Van Vechten, 19 John. 60, and Dubois *v.* The Delaware and Hudson Canal Co. 4 Wend. 285, are not easily reconcilable with many other authorities; and especially with Appleton *v.* Binks, 5 East, 148; Kennedy *v.* Gouveia, 3 Dowl. & Ryl. 503; Burrell *v.* Jones, 3 B. & Ald. 47; Norton *v.* Herron, 1 Carr. & Payne, 648; s. c. Ryan & Mood. 229. See also Hopkins *v.* Mehaffy, 11 Serg. & R. 126, 128, 129; Ante, § 273, note; Hall *v.* Bainbridge, 1 Mann. & Gr. 42. The case of Bowen *v.* Morris, 2 Taunt. 374, is distinguishable; for the contract was there treated as the contract of the principal, as was suggested by Lord Chief Justice Abbott, in Kennedy *v.* Gouveia, 3 Dowl. & Ryl. 503. See also Tippets *v.* Walker, 4 Mass. 595; Macbeath *v.* Haldimand, 1 T. R. 172, 176, 180, 181. In Spittle *v.* Lavender, 2 Brod. & Bing. 452, where an agreement purported to be between A. B. "as agent for, and on the part and behalf of," C. D., of the one part, and E. F., the plaintiff, of the other part; and on the same day the principal, C. D., wrote below on the same paper, "I hereby sanction this agreement, and approve of A. B. having signed the same in my behalf;" it was held, that, by his signature and approval on the paper, the contract became the contract of the principal, and not of the agent, and was to be treated as one transaction; and so the agent was not liable thereon. Ante, § 251, and note. See Kendray *v.* Hodgson, 5 Esp. 228; Stone *v.* Wood, 7 Cowen, 453; 3 Chitty on Com. & Manuf. 211, 212. In Brockway *v.* Allen, 17 Wend. 40, the defendants made a note, signed with their names, with the description added, "Trustees of the First Baptist Society of the village of Brockport." The defendants were trustees, and the society was incorporated by the name of the First Baptist Church and Society of the village of Brockport; and, by the laws of New York, where the note was made, and the society incorporated, the trustees, as such, are a corporation, having a common seal; and the note was for a debt due by the society. It was held, on special pleading, that the defendants were not personally liable on the note, and that the society was. Ante, § 154. But see Hills *v.* Bannister, 8 Cowen, 31. In Taft *v.* Brewster, 9 John. 334, where the defendants executed a bond to the plaintiff, by which the defendants, by the name and description of A. B., C. D., and E. F., "Trustees of the Baptist

however, the doctrine is to be understood with the qualification, that in the instrument there are apt words to charge the agent personally. For, if an agent should, without authority, execute a deed in the name of the principal, who is not bound thereby, the agent would not, in such a case, be liable to the other party on the instrument itself as his deed, unless there were apt words in it, importing a personal liability on his part.[1] The remedy for the misconduct of the agent must otherwise be by an action on the case.[2]

§ 279. But, in cases of unwritten contracts, also, the question may arise, whether the agent is liable, or the principal only, or both; and this, as a matter of fact, is generally left to the jury. In all cases, of this sort, the question generally is, to whom credit is given, whether to the principal or to the agent. If to the latter, then he is personally responsible, even although he may be known to be acting for his principal.[3] Thus, for example, an agent, although known as such, may, by his express warranty of soundness or of title, or of any other fact, in regard to the commodity sold by him for his principal, make himself personally liable, if the credit is clearly given to him on such warranty.[4] Indeed, if such warranty is made falsely and fraudulently by the agent, he will be personally liable thereon, as a matter of tort.[5]

§ 280. In the next place, persons contracting as agents, are nevertheless ordinarily, although, as we shall presently see,[6] not universally, held personally responsible, where there is no other responsible principal, to whom resort can be had.[7] Thus, for example, where a person signed a note, "as guardian of A. B.," he was held to be personally liable on the note; for he could not make his ward

Society of the town of Richfield," bound themselves in the form of, &c., &c.; and the bond was signed A. B., C. D., and E. F., "Trustees of the Baptist Society of Richfield," it was held, that the defendants were personally bound on the bond. See Fox *v.* Drake, 8 Cowen, 191; Osborne *v.* Kerr, 12 Wend. 179; Ante, §§ 160, 160 *a*, 161; Post, §§ 422, 450; [Tanner *v.* Christian, 29 Eng. L. & Eq. 103; Jefts *v.* York, 10 Cush. 392].

[1] Stetson *v.* Patten, 2 Greenl. 358; Ante, § 274 *b*.

[2] Ante, § 160, note, § 264, note, § 270, note.

[3] Scrace *v.* Whittington, 2 B. & Cressw. 11; Iveson *v.* Conington, 1 B. & Cressw. 160; Cunningham *v.* Soules, 7 Wend. 106; 3 Chitty on Com. & Manuf. 211, 212; Ante, §§ 160, 160 *a*, 161; [Curtis *v.* Williamson, L. R. 10 Q. B. 57].

[4] Fenn *v.* Harrison, 4 T. R. 177.

[5] Post, § 310.

[6] Post, §§ 287–290; Ante, § 274 *a*.

[7] 3 Chitty on Com. & Manuf. 211; 2 Kent, Comm. Lect. 41, p. 630 (4th ed.); Ante, § 155.

personally liable therefor, nor his ward's assets.[1] So, where a person signed a note, "as trustee of A. B.," he was held personally liable on the note; for it was not primarily binding on his *cestui que trust*.[2] So, where a person signed a note, as "executor of A. B.," or "as administrator of A. B.," it was held, that he was personally liable on the note; for such a note would not bind the estate of the deceased; and, to give it any validity, it must be construed to be a personal obligation of the maker.[3] So, a bill of exchange, accepted by A., "as administrator of B.," will bind A. personally.[4]

§ 281. This whole doctrine proceeds upon the plain principle, that he who is capable of contracting, and does contract in his own name, although he is the agent of another, who is incapable of contracting, intends to bind himself; since in no other way can the contract possess any validity, but it would perish from its intrinsic infirmity.[5] The Roman law fully recognized the propriety and justice of this doctrine, and applied it to the case of the master of a ship, who contracted with reference to the employment of the ship, for a slave, who was the employer of the ship (*exercitor navis*). "Item, si servus meus navem exercebit; et cum magistro ejus contraxero, nihil obstabit, quominus adversus magistrum experiar actione, quæ mihi vel jure civili, vel honorario competit."[6]

§ 282. The same doctrine has been applied to cases where persons are acting in a public official character on behalf of irresponsible persons (not on behalf of the government); upon the ground that, unless these persons are liable on the contracts so made by them, the other party will be left without remedy; and such an understanding is not to be presumed to have been intended by either party. Therefore, where certain persons were, by an act of Parliament, appointed

[1] Thacher *v.* Dinsmore, 5 Mass. 299; Forster *v.* Fuller, 6 Mass. 58.

[2] Hills *v.* Bannister, 8 Cowen, 31; Ante, §§ 154, 276; Sumner *v.* Williams, 8 Mass. 162. [So, where a party receives an assignment of a mortgage and note secured thereby and payment thereof as "Trustee," he was held liable for money paid under a mistake, when it was discovered that the note was a forgery. Welch *v.* Goodwin, 123 Mass. 71. And a party who signs a note in his own name "as solicitor of A." is personally liable on the note. Burrell *v.* Jones, 3 B. & Ald. 47; Roberts *v.* Button, 14 Vt. 195. And where a party signed a note as "Captain of Co. I. 49th Mo. Reg't.," he was held personally liable, as he had only disclosed an irresponsible principal. Blakely *v.* Bennecke, 59 Mo. 193. — Ed.]

[3] Forster *v.* Fuller, 6 Mass. 58; Childs *v.* Monins, 2 Brod. & Bing. 460. See also King *v.* Thorn, 1 T. R. 487; Ante, § 273.

[4] Tassey *v.* Church, 4 Watts & Serg. 346. [5] Ante, § 273.

[6] Dig. Lib. 14, tit. 1, l. 5, § 1; Pothier, Pand. Lib. 14, tit. 1, n. 17.

commissioners for making a river navigable, with power to raise and borrow money upon the tolls of navigation; and the acting commissioners gave orders, at their meetings, for work to be done, in furtherance of their duty in the premises; and, the work being done, the commissioners declined paying therefor, alleging that they had no funds left; it was held, upon a bill in equity against them, that they were personally responsible on the contract, upon the ground, that credit was given to them personally, and not merely to the funds.[1]

§ 283. So, where commissioners under an enclosure act were authorized to make a rate to defray the expenses of passing and executing the act; and the act declared, that persons advancing money should be repaid out of the first money received by the commissioners; and the commissioners, to defray the expenses, from time to time drew drafts on the plaintiffs, as bankers, in the form following: "Fordham (the month), A. D. (the year), Messrs. E. H. & Son, pay to John Morgan, or bearer, —— pounds, on account of the public drainage, and place the same to our account, as commissioners of the above enclosure;" it was put to the jury to say, whether credit was given to the defendants, the commissioners, personally, or to the fund; and the jury found for the plaintiffs. It was afterwards held, that the verdict was right, and that the commissioners were personally responsible on the drafts.[2]

§ 284. So, where the defendant, as chairman of the trustees of a turnpike road, signed a resolution of the trustees, that the plaintiff (the treasurer of the road) should be requested to make a temporary advance of money for the purposes of the road, it was left to the jury to say, whether the money had been advanced upon the security of the road, or upon the personal security of the defendant; and the jury found, that the money was lent upon the personal security of the defendant. It was afterwards held, that the verdict might well be supported, as it did not appear, that the trustees could give any security for a temporary loan upon the funds of the road; and, therefore, a personal security might well be presumed to have been intended.[3]

§ 285. Upon the same principle, where certain persons, on behalf

[1] Horsley *v.* Bell, 1 Brown, Ch. 101, note; s. c. Ambler, 770; [Murphy *v.* Lowell, 124 Mass. 564].

[2] Eaton *v.* Bell, 5 B. & Ald. 34. See also Higgins *v.* Livingstone, 4 Dow, 355.

[3] Parrott *v.* Eyre, 10 Bing. 292; Higgins *v.* Livingstone, 4 Dow, 355.

of a parish in England, made an agreement with the plaintiff to pave the streets of the parish, and to pay him therefor; it was held, that the persons, so contracting, were personally liable; for the parishioners, as such, could not be sued therefor.[1] So, where an overseer of the poor in England contracted with tradesmen upon account of the poor, and upon his own credit; it was held, that, as soon as he received so much of the poor's money, it became his own debt.[2] So, where the committee of a voluntary society entered into an agreement with a tradesman, for business to be done on behalf of the society, it was held, that they were personally liable thereon; for the credit must fairly be presumed to be given to them, rather than to the subscribers at large.[3] So, where the business of a voluntary eleemosynary society was conducted by a committee, it was held, that they were personally responsible to a baker, who supplied the establishment with bread at their request; for it might fairly be presumed that he looked to the committee for payment, and not to the subscribers at large.[4]

§ 286. So, where the defendants had become directors of a voluntary projected water company, for which an act of Parliament was to be obtained; and no act was obtained; but, in the mean time, the directors had published an advertisement for proposals for excavating and removing the earth and chalk for reservoirs; and the proposals of the plaintiff had been accepted; and the plaintiff had performed the labor and services upon a reservoir accordingly, for which the action was brought; and the whole scheme afterwards fell to the ground; it was held, that the defendants were personally liable for the amount.[5]

§ 286 *a*. So, where an indenture was made between A. of the first part, B. of the second part, and C., D., E., and F. of the third part, whereby A. covenanted with C., D., E., and F. to do certain repairs to the parish church of Z.; and, in consideration of the covenant on A.'s part, C., D., E., and F., "church-wardens and overseers of the poor of the parish of Z., for themselves and their suc-

[1] Meriel *v.* Wymondsold, Hardres, 205.

[2] Anon. 12 Mod. 559. See Lambert *v.* Knott, 6 Dowl. & Ryl. 122.

[3] Cullen *v.* Duke of Queensberry, 1 Bro. Ch. 101; s. c. 1 Bro. Parl. Cases, by Tomlins, 396; Lanchester *v.* Tricker, 1 Bing. 201. See Hoskins *v.* Slayton, Cas. temp. Hard. 376; [Gray *v.* Raper, L. R. 1 C. P. 694].

[4] Burls *v.* Smith, 7 Bing. 705. See Doubleday *v.* Muskett, 7 Bing. 110; Ridgely *v.* Dobson, 3 Watts & S. 118.

[5] Doubleday *v.* Muskett, 7 Bing. 110; [Dunton *v.* Chamberlin, 1 Ill. App. 361].

cessors, church-wardens and overseers of the said parish, and their assigns, did thereby covenant with A., his executors and administrators, that they, the said church-wardens and overseers of the poor, their successors, or assigns, should well and truly pay or cause to be paid unto A.," &c., the sum specified, by certain instalments; it was held, that C., D., E., and F. were personally liable on the covenant, notwithstanding there was an express proviso in the indenture, that nothing in the indenture "shall extend or be deemed, adjudged, construed, or taken to extend, to any personal covenant or obligation upon the said persons, parties thereto, of the third part, or in anywise personally affect them, or any of them, their or any of their executors, administrators, goods, effects, or estates, in their private capacity, but shall be, and is intended to be, binding and obligatory upon the church-wardens, and overseers of the poor of the parish of Z., and their successors for the time being, as such church-wardens and overseers of the poor; but not further or otherwise."[1] The ground of the decision seems to have been, that church-wardens and overseers, though they are by statute a corporate body for some purposes, cannot enter into such a covenant as this in a corporate character; and, if not, then the covenant must be a personal covenant; and that the proviso being repugnant to the covenant, must, according to the authorities, be rejected.[2]

§ 287. But, although it is thus true that persons, contracting as agents are ordinarily held personally responsible, where there is no other responsible principal to whom resort can be had; yet, the doctrine is not without some qualifications and exceptions, as, indeed, the words "ordinarily held" would lead one naturally to infer.[3] For, independent of the cases already suggested, where the contract is, or may be treated as a nullity, on account of its inherent infirmity or defective mode of execution,[4] other cases may exist, in which it is well known to both of the contracting parties, that there exists no authority in the agent to bind other persons for whom he is acting, or that there is no other responsible principal; and yet, the other contracting party may be content to deal with the agent, not upon his personal credit, or personal responsibility, but in the perfect faith and confidence, that such contracting party will be

[1] Furnivall *v.* Coombes, 5 Mann. & Gr. 736, 751, 752.
[2] Ibid.
[3] Ante, §§ 274 *a*, 274 *b*, 280.
[4] Ibid.

repaid and indemnified by the persons who feel the same interest in the subject-matter of the contract, even though there may be no legal obligation in the case.[1] Thus, for example, if private persons should subscribe a sum towards some charitable object, and should request an agent to employ tradesmen, and others, to supply materials to carry it into effect; and it should be distinctly made known by the agent, that the tradesmen and others were not to look to him, or to the subscribers personally, for payment; but that they must solely depend upon the success of the charitable subscription, and the state of the funds; and the supplies should be furnished with this clear understanding; there could be no doubt that neither the subscribers (at least, beyond their subscriptions), nor the agent, would be personally responsible. Such occurrences often take place in cases of voluntary charitable societies; and especially in cases of such charities, conducted by females, some of whom are married and some unmarried; where the tradesmen, who furnish supplies, are understood to trust entirely to the state of the funds, and to rely for reimbursement solely upon the funds, which may, from time to time, be obtained from charitable and beneficent persons.[2] For it has been well remarked, that few persons would be willing to become members or committees of bible societies, and other voluntary religious and eleemosynary institutions, if they were held to be personally bound, or personally liable to arrest for the bibles, or other articles, furnished in furtherance of such meritorious objects.[3] So, if a literary society should sign a subscription paper, agreeing to give a certain sum annually for books, to be paid to the treasurer, and books are ordered, the bookseller furnishing them cannot sue the subscribers upon the subscription paper.[4] Similar transactions may take place in relation to agents, acting for the public at large, or for particular public bodies, in cases avowedly beyond the scope of their authority, and yet, for the benefit of the public at large, or for particular public bodies, where the other contracting party may rely solely upon the public liberality and sense of justice to award him a suitable compensation, without in any manner giving credit to the agents, or looking to them for compensation.[5]

[1] Smith on Merc. Law, 79 (2d ed.); Id. B. 1, ch. 5, § 7, pp. 141–143 (3d ed. 1843); 2 Kent, Comm. Lect. 41, pp. 630, 631 (4th ed.).

[2] See Burls *v.* Smith, 7 Bing. 705.

[3] See Burls *v.* Smith, 7 Bing. 705.

[4] Ridgely *v.* Dobson, 3 Watts & S. 118.

[5] Tobey *v.* Clafflin, 3 Sumner, 379; Parrott *v.* Eyre, 10 Bing. 283.

§ 288. The truth, however, is, that the same general principle prevails in all these cases, notwithstanding their apparent diversity of form and decision. They are all answered by the same general inquiry: To whom is the credit knowingly given, according to the understanding of both parties? This inquiry is sometimes a matter of fact, as where the contract is verbal and unwritten, and sometimes a matter of law, as where it depends upon the true construction of the terms of a particular written instrument. The law, in all these cases, pronounces the same decision; that he to whom the credit is knowingly and exclusively given, is the proper person who incurs liability, whether he be the principal or the agent.[1]

§ 289. Hence it is, that, although it is perfectly well known, that a person is acting for others, as an agent, as, for example, for a club, if articles are furnished for the club at his request, upon the exclusive credit of the agent, or of any other particular member, no other persons, composing the club, will be liable therefor.[2] But it will

[1] Smith on Merc. Law, 79 (2d ed.); Id. ch. 5, § 7, pp. 140, 141 (3d ed. 1843); Delauney *v.* Strickland, 2 Stark. 416; 3 Chitty on Com. & Manuf. 211, 212; Paterson *v.* Gandasequi, 15 East, 62, 64, 66, 68, 69; *Ex parte* Hartop, 12 Ves. 352; Thomson *v.* Davenport, 9 B. & Cressw. 78, 88, 90; Addison *v.* Gandasequi, 4 Taunt. 575; Owen *v.* Gooch, 2 Esp. 567; Hyde *v.* Wolff, 4 La. 234. See the language of Lord Erskine, in *Ex parte* Hartop, 12 Ves. 352, cited Ante, § 261, note (1). In Owen *v.* Gooch, 2 Esp. 568, Lord Kenyon said: "The goods are ordered by Gooch, but at the time it is not pretended that they were for his own use; they were ordered for Tippell, and the entry is made in his name. We must keep distinct the cases of orders given by the parties themselves, and by others as their agents. If the mere act of ordering goods was to make the party, who ordered them, liable, no man could give an order for a friend in the country, who might request him to do it, without risk to himself. If a party orders goods from a tradesman, though in fact they are for another, if the tradesman was not informed at the time that they were for the use of another, he who ordered them is certainly liable, for the tradesman must be presumed to have looked to his credit only. So, if they were ordered for another person, and the tradesman refuses to deliver to such person's credit, but to his credit only who orders them, there is then no pretext for charging such third person; or, if goods are ordered to be delivered on account of another, and, after delivery, the person who gave the order, refuses to inform the tradesman who the person is, in order that he may sue him, under such circumstances he is himself liable; but, wherever an order is given by one person for another, and he informs the tradesman who that person is, for whose use the goods are ordered, he thereby declares himself to be merely an agent, and there is no foundation for holding him to be liable."

[2] Delauney *v.* Strickland, 2 Stark. 416; Paterson *v.* Gandasequi, 15 East, 62, 64, 68. See Todd *v.* Emly, 7 Mees. & Wels. 427; Todd *v.* Emly, 8 Mees. & Wels. 505. [And where a member of a building committee of a church purchases, as one of the committee, articles to be used in the erection of the

not necessarily be conclusive proof of such an exclusive credit, that the agent, or other member, is charged in the creditor's books, or that the account is made out in his name; for it is a mere matter of presumption, to which a jury may attach more or less weight, according to circumstances.[1] So, also, if a foreign merchant, not choosing to make himself personally liable, should go with his agent to tradesmen, and should buy goods in the agent's name, and credit should be given to the agent, although the principal is known, there cannot be the slightest doubt, that no recovery could be had for the goods against the principal.[2] Indeed, the doctrine may be stated in a more general form, that, wherever exclusive credit is given to an agent in any transaction for a known principal, there, the party must abide by his election; and he cannot afterwards hold the principal liable therefor.[3]

§ 290. There are cases in which the presumption of an exclusive credit being given to an agent is so strong as almost to amount to a conclusive presumption of law. Thus, for example, where a known factor buys or sells goods for his principal, who is resident in a foreign country (as, for example, in France or Germany), it will be presumed, in the absence of all rebutting circumstances, that credit is given exclusively to the factor in the whole transaction, and that he is dealt with as the principal.[4] This doctrine may be satisfac-

church, he is personally liable for the value of such articles. Cruse *v.* Jones, 3 Lea, (Tenn.), 66. See Eichbaum *v.* Irons, 6 W. & S. 67; Flemyng *v.* Hector, 2 M. & W. 172; Cockerell *v.* Ancompte, 2 C. B. N. S. 440. *In re* St. James Club, 2 De G. M. & G. 383. — ED.]

[1] Ibid.

[2] Paterson *v.* Gandasequi, 13 East, 64, 66, 68; Addison *v.* Gandasequi, 5 Taunt. 574.

[3] Thomson *v.* Davenport, 9 B. & Cressw. 78, 88, 98; Addison *v.* Gandasequi, 4 Taunt. 574; [Ranken *v.* Deforest, 18 Barb. 143].

[4] Gonzales *v.* Sladen, Bull. N. P. 130; Paterson *v.* Gandasequi, 15 East, 68, 69; Thomson *v.* Davenport, 9 B. & Cressw. 78, 87, 88; 3 Chitty, Com. & Manuf. 203; Houghton *v.* Mathews, 3 Bos. & Pull. 489, 490, per Chambre, J.; Smith on Merc. Law, 66, 78 (3d ed.); Id. B. 1, ch. 5, § 7, pp. 142, 143 (3d ed. 1843); Addison *v.* Gandasequi, 4 Taunt. 575; 1 Bell, Comm. § 418, p. 398 (4th ed.); Id. pp. 491, 492 (5th ed.). In De Gaillon *v.* L'Aigle, 1 Bos. & Pull. 359, Lord Chief Justice Eyre said: "I am not aware, that I have ever concurred in any decision, in which it has been held, that, if a person describing himself as agent for another residing abroad, enter into a contract here, he is not personally liable on the contract." Lord Tenterden, in Thomson *v.* Davenport, 9 B. & Cressw. 87, said: "There may be another case, and that is, where a British merchant is buying for a foreigner. According to the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner." Ante, §§ 267,

torily explained, in many cases, by the consideration already stated, that there is no other known responsible principal.[1] But it is founded upon a broader ground, — namely, upon the presumption that the party dealing with the agent intends to trust one who is known to him, and resides in the same country, and is subject to the same laws as himself, rather than to one who, if known, cannot, from his residence in a foreign country, be made amenable to those laws, and whose liability may be affected by local institutions and local exemptions, which may put at hazard both his rights and his remedies.[2] *A fortiori*, the doctrine will apply to an agent acting for an unknown principal in a foreign country.

§ 291. In the cases which have been already stated, the principal question discussed has been, to whom credit has been exclusively given. And this leads us to remark, that, although in general where credit is given, either to the agent or to the principal, a presumption will arise that it is an exclusive credit, yet this doctrine is far from being universally true. The cases to which it properly applies, are those where the agent is acting for a known principal, and the party dealing with the agent, elects to credit one, and not the other.[3] When, therefore, the agent acts without disclosing that he is acting as an agent; or when, acting as a known agent, he does not disclose the name of his principal; there, although credit is given to the agent, yet it is not deemed to be an exclusive credit.[4] On the contrary, when the principal is discovered, he also will be deemed responsible, as well as the agent.[5] There is this qualifica-

268. But see Taintor *v.* Prendergast, 3 Hill, 72, 73; Kirkpatrick *v.* Stainer, 22 Wend. 244, and Ante, § 268, note; Post, §§ 291, note, 400; [Green *v.* Kopke, 36 Eng. Law & Eq. 398].

[1] Ante, § 280; Post, §§ 400, 423, 448; [Kingsley *v.* Davis, 104 Mass. 178].

[2] Ante, § 268, and note; Post, § 400.

[3] Hyde *v.* Wolff, 4 La. 234; [Emma Silver Mining Co. *v.* N. Y. Emma Mining Co. 14 Am. L. R. 803].

[4] Ante, §§ 266-268; Post, §§ 393, 396; [Ames *v.* Tucker, 14 Am. Law Rev. 90].

[5] Smith on Merc. Law, 65, 66, 78; Railton *v.* Hodgson, 4 Taunt. 576, note; Wilson *v.* Hart, 7 Taunt. 295; Thomson *v.* Davenport, 9 B. & Cressw. 78; Hyde *v.* Wolff, 4 La. 234, 236; Upton *v.* Gray, 2 Greenl. 373; 2 Kent, Comm. Lect. 41, pp. 630, 631 (4th ed.). This whole doctrine, and its distinctions, are fully expounded by the court, in Thomson *v.* Davenport, 9 B. & Cressw. 78. On that occasion, Lord Tenterden said, pp. 86, 87: "I take it to be a general rule, that if a person sells goods (supposing, at the time of the contract, he is dealing with a principal), but afterwards discovers that the person, with whom he has been dealing, is not the principal in the transaction, but agent for a third person, though he may, in the mean time, have debited the

tion, however, annexed to such liability of the principal, that nothing has, in the mean time, passed between the principal and the

agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if, at the time of the sale, the seller knows not only that the person, who is nominally dealing with him, is not principal, but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him, and him alone; then, according to the cases of Addison *v.* Gandasequi, and Paterson *v.* Gandasequi, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time, when he had the power of choosing between the one and the other. The present is a middle case. At the time of the dealing for the goods, the plaintiffs were informed, that M'Kune, who came to them to buy the goods, was dealing for another, that is, that he was agent; but they were not informed who the principal was. They had not, therefore, at that time, the means of making their election. It is true that they might, perhaps, have obtained those means, if they had made further inquiry. But they made no further inquiry. Not knowing who the principal really was, they had not the power at that instant of making their election. That being so, it seems to me that this middle case falls in substance and effect within the first proposition, which I have mentioned, the case of a person not known to be an agent; and not within the second, where the buyer is not merely known to be an agent, but the name of his principal is also known." In Mr. Lloyd's edition of Paley on Agency, Pt. 1, ch. 3, § 8, pp. 245–250, these distinctions are laid down with great clearness and accuracy. He says: "Indeed, there are several ways in which the liability of the principal may be affected in purchases made by his agent, of which the following summary may be useful: 1st. The purchase may be made by the broker expressly for, and in the name of, his principal. In that case, if the principal be debited by the seller, he only, and not the broker, will be liable. 2d. A broker may purchase in his character of broker, for a known principal; but the seller may choose, nevertheless, to take him for his debtor, rather than the principal, in whose credit he may not have the same confidence; and after this deliberate election, the seller cannot afterwards turn round and charge the principal. 3d. The broker may buy in his own name, without disclosing his principal, in which case the invoices will, of course, be made out to him, and he will be debited with the account. If now, before payment, the seller discover that the purchase was, in fact, made for another, he may, at his choice, look for payment either to the broker or the principal; to the former upon his personal contract, to the latter upon the contract of his agent; and the adoption of the purchase by the principal will be evidence of the agent's authority. But, 4th. If, after the disclosure of the principal, the seller lie by and suffer the principal to settle an account with his broker for the amount of the purchase, he cannot afterwards charge the former, so as to make him a loser, but will be deemed to have elected the broker for his debtor. And, 5th. If the principal be a foreigner, it seems that, by the usage of trade, the credit is to be considered as having been given to the English broker, and that he only, and not the foreign buyer, will be liable. That question, however, is for the jury. 6th. There is still an intermediate case, where upon a purchase by a broker, the seller, knowing that he is acting as broker in the

agent to alter the state of their accounts, or otherwise to operate injuriously to the principal, if he has acted in the confidence, that exclusive credit was given to the agent; and, moreover, that there has been no laches on the part of the creditor.[1]

§ 292. The same doctrine, as to the liability of the principal as well as of the agent, has been recognized in the law of many, if not of all, the nations of continental Europe.[2] Thus, Pothier lays it down as clear, that, where an agent contracts in his quality as agent in his own name, his principal is bound as well as the agent himself.[3] His language is, that in all such engagements, which an agent contracts for the affairs committed to his charge, although he contracts in his own name, he binds himself, as principal, and, at the same time, he binds his employer, as an accessory debtor; for the employer is considered as having consented beforehand, by the commission which he has given, to all the engagements which the agent might contract in the business to which he is appointed, and to have

transaction, but not for whom, makes out the invoice to him, and debits him with the price; can the seller afterwards, when the name of the principal is made known to him, substitute him as the debtor, and call upon him for payment? On the one part, it is said, the seller, in debiting the broker, can have exercised no election, because election implies a preference, and there can be no preference, where the principal is unknown. On the other part, it is answered, that the seller might have known, by simply asking the question, and that the omitting to make the inquiry is decisive evidence of a deliberate preference of the broker. The Court of King's Bench has decided that the principal, in such case, is not discharged; but the decision has not been considered very satisfactory, and is certainly not implicitly acquiesced in."

[1] Smith on Merc. Law, 66, 78 (2d ed.); Id. B. 1, ch. 5, § 7, pp. 140–142 (3d ed. 1843); Thomson *v.* Davenport, 9 B. & Cressw. 78; Horsfall *v.* Fauntleroy, 10 B. & Cressw. 755; 3 Chitty on Com. & Manuf. 203; Rathbone *v.* Tucker, 15 Wend. 498. *A fortiori*, if the seller has furnished the agent with the means of misrepresenting the contract to his principal, and the latter has actually paid his agent for the goods purchased, according to the terms communicated to him, he will be discharged from all liability to the seller. Horsfall *v.* Fauntleroy, 10 B. & Cressw. 755. [And where A. has received money on a policy of insurance as agent and promptly paid it to his principal without notice of an adverse claim or any reason to expect it, the party dealing with him must look to his principal, having been guilty of laches in not demanding repayment earlier. Hooper *v.* Robinson, 98 U. S. 528; Thomas *v.* Atkinson, 38 Ind. 248. So, a vendor who has given credit to an agent, believing him to be the principal, cannot recover against the principal when disclosed, if the latter has in the mean time paid the agent. Armstrong *v.* Stokes, L. R. 7 Q. B. 598. — Ed.]

[2] See 1 Bell, Comm. § 418, p. 398 (4th ed.); Id. pp. 492, 494 (5th ed.); Pothier on Oblig. by Evans, notes 82, 446, 447.

[3] Pothier on Oblig. by Evans, notes 82, 447–449; Hyde *v.* Wolff, 4 La. 234; Hopkins *v.* Lacouture, 4 La. 64, 66.

rendered himself answerable for them.[1] Undoubtedly, exceptions may exist in regard to this general liability in the foreign law, as they do in ours, wherever an exclusive credit is shown to be given either to the employer or to the agent.[2]

§ 293. There are some particular agencies in which the presumption of a reciprocal credit between the principal and agent and third persons is generally understood to arise by the usages of trade or by intendment of law. Such, for example, is the case in the ordinary dealings of home factors in buying and selling goods. So that, in case of a purchase by such a factor, he, as well as his principal, is deemed liable for the debt; and, in case of a sale by such a factor, the buyer is liable, both to the principal and to the factor, for the debt.[3] This is the ordinary presumption, which, however, may be repelled by any proofs of exclusive credit or contract with either, arising from the circumstances of the particular transaction.[4]

§ 294. But the most striking case of this sort is that of a master of a ship contracting within the ordinary scope of his powers and duties. In such a case, he is, in general, personally responsible, as well as the owner, upon all contracts made by him for the employment and repairs and supplies of the ship. This is the established rule of our maritime law; and it is said to have been introduced in favor of commerce, so that merchants may not be compelled to seek after the owners to sue them, but that they may have a twofold remedy against the owners and against the master.[5] Nor

[1] Pothier on Oblig. by Evans, n. 447; Id. n. 82.

[2] Hyde *v.* Wolff, 4 La. 234; Hopkins *v.* Lacouture, 4 La. 64.

[3] 1 Bell, Comm. § 418, p. 398 (4th ed.); Id. pp. 494, 508 (5th ed.); Ante, §§ 269, 270; Post, §§ 400, 401.

[4] Ante, §§ 267, 291; Thomson *v.* Davenport, 9 B. & Cressw. 78, 88, 91; Paterson *v.* Gandasequi, 15 East, 62.

[5] Post, § 315; Abbott on Shipp. Pt. 2, ch. 2, § 3, p. 90 (ed. 1829); Id. §§ 3–5, pp. 91–94; Id. ch. 3, §§ 2–9, pp. 100–107; Rich *v.* Coe, Cowp. 637; James *v.* Bixby, 11 Mass. 34; Ante, §§ 36, 116, 117; Hussey *v.* Christie, 9 East, 426, 432; 3 Kent, Comm. Lect. 46, p. 161 (4th ed.); The Nelson, 6 Rob. 227. The American authorities on this subject are in perfect coincidence with the English. Many of them are cited in the notes to the American edition of Abbott on Shipping (ed. 1829), Pt. 2, ch. 2, § 2, note 1, and § 3; Id. ch. 3, § 2, note 1; Id. § 3, notes 1 and 2. Indeed, in many cases, there may be a threefold remedy, against the ship, the owner, and the master; as, for example, by seamen for their wages; and by material-men, for repairs and supplies in foreign ports. See Abbott on Shipp. Pt. 2, ch. 2, §§ 2, 3, 10, and notes to the American edition of 1829; Id. Pt. 4, ch. 4, §§ 1, 2–10, and notes to the American edition of 1829; Rich *v.* Coe, Cowp. 637; 1 Bell, Comm. p. 508 (5th ed.); [Wilmot *v.* Richardson, 4 Abb. App. Cas. 614].

is this doctrine peculiar to our law; but it has been fully recognized and adopted by the commercial nations of continental Europe.[1] In truth, however, it has been derived, both to us and to them, from the Roman law, promulgated by the prætor's edict, whereby the owners and employers of the ship are positively made responsible for the faults of the master and crew, and also for the contracts of the master, in matters within the scope of his authority.[2] "Utilitatem hujus edicti patere (says the Digest) nemo est, qui ignoret. Nam cum interdum ignari, cujus sint conditionis, vel quales, cum magistris propter navigandi necessitatem contrahamus, æquum fuit, eum, qui magistrum navi imposuit, teneri; ut tenetur, qui institorem tabernæ, vel negotio, præposuit; cum sit major necessitas contrahendi cum magistro, quam institore; quippe res patitur, ut de conditione quis institoris dispiciat, et sic contrahat. In navis magistro non ita; nam interdum locus, tempus non patitur plenius deliberandi consilium."[3] And it is afterwards added: "Sed ex contrario, exercenti navem adversus eos, qui cum magistro contraxerunt, actio non pollicetur; quia non eodem auxilio indigebat. Sed aut ex locato cum magistro, si mercede operam ei exhibit; aut si gratuitam, mandati agere potest."[4] The exercitorial action, thus given against the owner, is merely accessorial or supplemental to that against the master, and does not supersede or extinguish it. "Hoc enim edicto non transfertur actio; sed adjicitur."[5] The rule thus promulgated, and the reasoning by which it is supported, are precisely the same which, in modern times, have been adopted, as the just foundations of maritime jurisprudence: "Eo usque producendam utilitatem navigantium."[6]

§ 295. There seems, however, to be one peculiarity in the Roman law on this subject; and that is, that, while it gives a right to pro-

[1] Abbott on Shipp. Pt. 2, ch. 2, § 3, p. 91 (ed. 1829); Id. § 4, p. 93; Id. § 5, p. 94; Id. ch. 3, §§ 2, 3–9, pp. 100–107; Ante, §§ 116, 160, 161, 278; Pothier on Oblig. n. 82, 448; 2 Emerig. Assur. ch. 4, § 10, p. 448; Id. ch. 4, § 12, pp. 465–468; Ersk. Inst. B. 3, tit. 3, § 43; 1 Stair, Inst. by Brodie, B. 1, tit. 13, § 18; 1 Bell, Comm. § 434, p. 413 (4th ed.); Id. pp. 507, 508; Id. pp. 522, 533 (5th ed.).

[2] Ibid.; Ante, §§ 116, 117; Dig. Lib. 4, tit. 9, l. 1; Abbott on Shipp. Pt. 2, ch. 2, § 3, and note (*g*), p. 91 (Amer. ed. 1829).

[3] Dig. Lib. 14, tit. 1, l. 1, Introd. and § 17; Pothier, Pand. Lib. 14, tit. 1, n. 2.

[4] Dig. Lib. 14, tit. 1, l. 1, § 18; Pothier, Pand. Lib. 14, tit. 1, n. 18.

[5] Dig. Lib. 14, tit. 1, l. 5, § 1.

[6] Dig. Lib. 14, tit. 1, l. 1, § 5.

ceed against the owner or employer, as well as against the master of the ship, for the amount of the repairs and supplies furnished for the ship, and for other contracts made by him within the scope of his employment; yet if the creditor elects to proceed in a suit against either of them, he thereby discharges the other. "Est autem nobis electio, utrum exercitorem, an magistrum convenire velimus.[1] Hæc actio ex personâ magistri in exercitorem dabitur. Et ideo, si cum utro eorum actum est, cum altero agi non potest."[2] Our law, on the other hand, while it gives an election to the creditor to sue either the master or the owner, in a distinct and separate action, does not preclude the creditor, by such an election, from maintaining another action against the party not sued, unless, in the first action, he has obtained a complete satisfaction of the claim.[3]

§ 296. Such, then, as above stated, is the general doctrine of our law; but it prevails only in the absence of any satisfactory proof that exclusive credit is given either to the owner or to the master; for it is perfectly competent for the parties to contract so as to confine the responsibility either to the master or to the owner.[4] If, therefore, there is satisfactory proof that exclusive credit has been given to the one, the other will be completely discharged. Nay, the principle has been carried further; and it has been held, that if the party has so conducted himself in the particular transaction as to lead to the conclusion that an exclusive credit has been given either to the master or to the owner, severally, he will not be permitted afterwards to assert his claim, to the prejudice of the party whom he has misled into the belief that he is exonerated.[5]

[1] Dig. Lib. 14, tit. 1, l. 1, § 17; Pothier, Pand. Lib. 14, tit. 1, n. 17.

[2] Dig. Lib. 14, tit. 1, l. 1, § 24; Pothier, Pand. Lib. 14, tit. 1, n. 17.

[3] Emerigon understands the Roman law differently from what I have stated; and supposes it to be exactly like our law (2 Emerig. Assur. ch. 4, § 10, pp. 448, 449); and he cites Stypmannus, and Daurenus also, as authorities in support of his opinion. It is with great diffidence, that I have ventured to differ from such authorities, in the interpretation of the words of the Roman text; and I am far from feeling certain, that I have not misunderstood that text; although I am not satisfied, that the language cited from Stypmannus, does support the proposition of Emerigon. [The proposition in the text to which this note is appended is denied to be law, in Priestly *v.* Fernie, 11 Jur. N. S. 813, 3 Hurl. & C. 977, and the law declared to be, that the master of a ship having been sued to judgment on a bill of lading, the owner cannot be sued, although the judgment be not satisfied.]

[4] James *v.* Bixby, 11 Mass. 34, 36, 37.

[5] Abbott on Shipp. Pt. 2, ch. 3, § 2, p. 100 (Amer. ed. 1829), and notes, Ibid.; Wyatt *v.* Marquis of Hertford, 3 East, 147; Hyde *v.* Wolff, 4 La. 234;

§ 297. What will amount to satisfactory proof of an exclusive credit, must necessarily depend upon the circumstances of each particular case, and, of course, admits of no positive or universal averment. In general, it may be stated, that the mere fact that the repairs are made, or the supplies furnished, either in the home port or in a foreign country, at the request of the master, will be sufficient to charge him, but not to discharge the owner, as a personal and exclusive credit to the master, unless some positive contract or other act can be shown which demonstrates an intention to discharge the owner.[1] Nor will a charge of the repairs or supplies in the books of the material-men, in such a case, against the master personally, be sufficient to discharge the owner; because such a charge is quite consistent with the intention still to hold the owner liable, whether he be then known or unknown.[2] *A fortiori*, if the charge is made against the ship by her name, without charging either the master or the owner as the debtor, both will be liable; for, in such a case, the master and the owner may well be deemed as equally representatives of the ship.[3]

§ 298. It will make no difference in respect to the liability of the owner, in cases of repairs to ships, that by a private agreement or charter-party, between the owner and the master, the latter is to have the entire ship to his own use for a specified period, and is to

Reed *v.* White, 5 Esp. 122; Schemerhorn *v.* Loines, 7 John. 311; Muldon *v.* Whitlock, 1 Cowen, 299. The same doctrine will apply to cases, where, after a contract has been made, binding both principal and agent, the seller gives an exclusive credit to the agent for the debt, and induces the principal to believe that the debt is settled by the agent; as, for example, if, after a sale to the agent, the seller takes the note, or other security of the agent, for the amount, or gives him a receipt, or other document, showing an apparent extinguishment of the debt, and thereby enables the agent to settle with the principal, as if the debt had been paid. Hyde *v.* Wolff, 4 La. 234, 236; 1 Bell, Comm. § 418, p. 398 (4th ed.); Id. pp. 494, 507, 522–524, 537, 538 (5th ed.); Reed *v.* White, 5 Esp. 122; Stewart *v.* Hall, 2 Dow, 29; Porter *v.* Talcott, 1 Cowen, 359.

[1] Abbott on Shipp. Pt. 2, ch. 3, §§ 2, 3; Hussey *v.* Allen, 6 Mass. 163, 165; Rich *v.* Coe, Cowp. 636; Leonard *v.* Huntington, 15 John. 298; Marquand *v.* Webb, 16 John. 89; 3 Chitty on Com. & Manuf. 212; Garnham *v.* Bennett, 2 Str. 816; James *v.* Bixby, 11 Mass. 34, 36; Hussey *v.* Christie, 9 East, 432; 3 Kent, Comm. Lect. 46, p. 161 (4th ed.); 1 Bell, Comm. § 434, p. 413 (4th ed.); Id. pp. 494, 507, 522–524, 537, 538 (5th ed.).

[2] See Farmer *v.* Davis, 1 T. R. 108, 109; Muldon *v.* Whitlock, 1 Cowen, 299.

[3] See Farmer *v.* Davis, 1 T. R. 108, 109; Muldon *v.* Whitlock, 1 Cowen, 299; Stewart *v.* Hall, 2 Dow, 29; Abbott on Shipp. Pt. 1, ch. 3, § 7, note (1) (Amer. ed. 1829); Id. Pt. 2, ch. 3, § 1, note (1).

make all the repairs at his own expense; for such a private agreement cannot vary the rights of third persons.[1] Neither will it make any difference as to the liability of the owner, that the master has bound himself personally by a written contract, if such contract does not establish, that an exclusive credit is given to the master; for, in many cases (as, for example, in the common shipping-articles between the master and seamen for a voyage[2]) the owner will be bound by the written contract of the master in his own name, especially where it is according to the common usage of the employment. Similar considerations apply to the execution of charter-parties, and of bills of lading, by the master, within the scope of his general authority.[3]

[1] Rich *v.* Coe, Cowp. 636. [But where a master hires the vessel "on shares," and agrees to victual and man her, and employ her in such voyages as he thinks best, and has entire control and possession of the vessel, he, and not the owners, is responsible for necessary supplies. Webb *v.* Peirce, 1 Curtis C. C. 104; Tucker *v.* Stimson, 12 Gray, 487. And while the vessel is in the employ of a charterer, the owner will not be responsible for supplies furnished to her. Perry *v.* Osborne, 5 Pick. 422. So, where the master is the charterer. Uraun *v.* Fletcher, 1 Gray, 125; Baker *v.* Huckins, 5 Gray, 596. — Ed.]

[2] Abbott on Shipp. Pt. 2, ch. 3, §§ 2, 3; Pt. 4, ch. 1, § 1; Id. ch. 4, §§ 1, 10, and notes (Amer. ed. 1829); The Nelson, 6 Rob. 227; Ante, §§ 116, 161, 294.

[3] Abbott on Shipp. Pt. 2, ch. 2, § 5; ch. 3, §§ 2, 3; Pt. 3. ch. 1, § 2; Cock *v.* Taylor, 13 East, 399; Ante, §§ 116, 160, 161, 294; Jones *v.* Littledale, 6 Adolph. & Ellis, 486–490. Lord Mansfield fully expounded this whole doctrine in Rich *v.* Coe, Cowp. 636, 639. On that occasion, his Lordship said: "Whoever supplies a ship with necessaries, has a treble security. 1. The person of the master. 2. The specific ship. 3. The personal security of the owners, whether they know of the supply or not. 1. The master is personally liable, as making the contract. 2. The owners are liable, in consequence of the master's act, because they choose him. They run the risk, and they say whom they will trust with the appointment and office of master. Suppose the owners, in this case, had delivered the value of the goods in question in specie to the master, with directions for him to pay it over to the creditors, and the master had embezzled the money; it would have been no concern of the creditors; for they trust specifically to the ship, and generally to the owners. In this case, the defendants are the owners, and there happens to be a private agreement between them and the master, by which he is to have the sole conduct and management of the ship, and to keep her in repair, &c. But how does that affect the creditors, who, it is expressly stated, were total strangers to the transaction? And that is an answer to the observation, that the plaintiff must have known the real situation of the master in this case, from the general usage and custom of the country in that respect. To be sure, if it appeared, that a tradesman had notice of such a contract, and, in consequence of it, gave credit to the captain individually, as the responsible person, particular circumstances of that sort might afford a ground to say, he meant to absolve the

§ 299. On the other hand, if the ship is in the home port of the owner, and repairs are there made, or supplies furnished, at the request of the master, the mere fact of the presence of the owner in the home port will not exonerate the master from responsibility.[1] But,

owners, and to look singly to the personal security of the master. But here it is stated, that the plaintiff had no notice whatever of the contract. The owners themselves are aware of their being liable at the time. They choose a master, to whom they agree to let the ship; and trust, for their security, to the covenants which they oblige him to enter into. These covenants are, that he shall keep the ship in repair, and deliver her up, at the end of the term, in as good condition, as when delivered to him. This is not all; for they indemnify themselves against the private debts of the master; and against his being taken in execution; for if he does not perform all and every the covenants in the agreement (except in case of the loss of the ship), the consequence, besides their remedy against him upon the covenant, is, that the contract and agreement is to be absolutely at an end, and they are to take possession of the ship. Suppose the ship had been impounded in the Admiralty Court, and that had happened at the end of the term; or suppose the captain had then broken a covenant, which had put an end to the agreement; the defendants could never have taken the ship out of the court, without paying the debt, for which the ship was impounded. We are all of opinion, therefore, that under these circumstances, there is no color to say, that the creditors should be stripped of the general security, they are by law entitled to, against the owners." See also Abbott on Shipp. Pt. 2, ch. 3, §§ 1, 3, 10; Id. Pt. 4, ch. 4, § 1, note (Amer. ed. 1828); Aspinwall *v.* Bartlett, 8 Mass. 483; Farmer *v.* Davis, 1 T. R. 109. In this last case, Lord Mansfield said: "Where a captain contracts for the use of the ship, the credit is given to him in respect to his contract; it is given to the owners, because the contract is on their account; and the tradesman has likewise a specific lien on the ship itself. Therefore, in general, the tradesman, who gives that credit, debits both the captain and the owners. Now, what is this case? The captain made no contract personally. The owners contracted for their ship; the credit was given to them only, and there is not a shadow of color to charge the captain for any part of these goods."

[1] Hussey *v.* Christie, 9 East, 426, 432; Hoskins *v.* Slayton, Cas. temp. Hard. 376; Rich *v.* Coe, Cowp. 636; Abbott on Shipp. Pt. 2, ch. 3, §§ 2–4; James *v.* Bixby, 11 Mass. 34, 36, 37; Marquand *v.* Webb, 16 John. 89; Stewart *v.* Hall, 2 Dow, 29; Farmer *v.* Davis, 1 T. R. 108. In Hussey *v.* Christie, 9 East, 432, Lord Ellenborough, in delivering the opinion of the court, said: "If the repairs be done here, the owners are liable; though the master may also become liable on his own contract, if he do not stipulate against his personal liability, and confine the credit to his owners. If the necessary repairs be done abroad, the master may hypothecate the ship for them; and it is his own fault, if he subjects himself to any personal responsibility which he may renounce." In Hoskins *v.* Slayton, Cas. temp. Hard. 377, which was the case of sales made for the ship at a home port, and ordered by the master, Lord Chief Justice Lee said: "In general, if the master orders the goods, both are liable; the master, who gives the orders, and upon whose credit the work is done, and the owners, in respect of the work being done to their property; for if I, without having given orders, suffer a work to be done for me, I must pay for it. But yet, though both are liable in such a case, if it appears, that the credit was given to

in such a case, if the contract for the repairs or supplies, is directly with the owner, and not with the master, a strong presumption will arise, that credit is given exclusively to the owner, which it would require cogent proofs to rebut or overcome.[1] But the like presumption will not arise on a contract for seamen's wages, that exclusive credit is given to the owner by the crew, from the mere fact that the owner shipped the crew in the home port; as the shipping articles generally contemplate the contract to be made by and with the master, and the maritime law treats the master, from his direct relation to the crew, as incurring a personal responsibility to them for their wages. It will, of course, under such circumstances, require the most positive and satisfactory proof, *omni exceptione major*, to sustain a defence by the master, that exclusive credit is given by the crew to the owner for their wages.[2]

§ 300. The liability of agents to third persons on contracts, may also arise from acts done, or refused to be done, by such agents. Thus, for example, if a party who has paid money to an agent for the use of his principal, becomes entitled to recall it, he may upon notice to the agent recall it, provided the agent has not paid it over to his principal, and also provided no change has taken place in the situation of the agent since the payment to him, before such notice.[3]

the owners only, and that the master, in giving orders, acted merely as their servant, he will not be liable;" and he directed the jury, that, if, upon the evidence, they thought no credit was given to the master, but the owners alone, then they should find for defendant. The jury found a verdict for the defendant. See also 1 Bell, Comm. §§ 434, 435, pp. 413, 414 (4th ed.); Id. pp. 507, 519, 520, 524 (5th ed.).

[1] Farmer *v.* Davis, 1 T. R. 108; Ante, §§ 294, 296–298, note; Hoskins *v.* Slayton, Cas. temp. Hard. 376, 377; Abbott on Shipp. Pt. 2, ch. 2, §§ 2–4; James *v.* Bixby, 11 Mass. 34, 36, 37.

[2] Abbott on Shipp. Pt. 4, ch. 4, § 1, and note (2); Id. § 10 (Amer. ed. 1829). See 2 Emerig. Assur. ch. 4, § 12, p. 467. See 1 Bell, Comm. § 435, p. 414 (4th ed.); Id. § 418, p. 398 (4th ed.); Id. pp. 507, 508, 519–524 (5th ed.).

[3] 3 Chitty on Com. & Manuf. 213; 2 Liverm. on Agency, 260, 261 (ed. 1818); Cox *v.* Prentice, 3 M. & Selw. 344; Hearsay *v.* Pruyn, 7 John. 179; Mowatt *v.* M'Lellan, 1 Wend. 173. In the Bank of United States *v.* The Bank of Washington, 6 Peters, 8, it was held, that where a judgment had been recovered for the plaintiff, and the money had been received by the agent, notice to the agent to retain it, the other party intending to bring a writ of error to reverse the judgment, would not, in case of a reversal, justify an action against the agent. On that occasion, Mr. Justice Thompson, in delivering the opinion of the court, said: "When the money was paid, there was a legal obligation, on the part of the Bank of Washington, to pay it; and a legal right, on the part of Triplett and Neale, to demand and receive it, or to enforce payment of it under the execution. And whatever was done under that execution, whilst the judg-

The mere fact that the agent has passed such money in account with his principal, or that he has made a rest in his accounts, without any new credit being given to the principal, will not of itself be sufficient to entitle the agent to retain the money, when the party entitled to recall it demands it.[1] But if a new credit has been given to the principal since the payment, or if bills have been accepted, or if advances have been made on the footing of it, the payment cannot be recalled.[2] *A fortiori*, if the money has been paid over to the principal before notice of the recall, the agent will not be liable, unless indeed the receipt of the money by the agent was obviously fraudulent and illegal, or his authority to receive it was known to himself to be utterly void.[3]

ment was in full force, was valid and binding on the Bank of Washington, so far as the rights of strangers or third persons are concerned. The reversal of the judgment cannot have a retrospective operation, and make void that which was lawful when done. The reversal of the judgment gives a new right, or cause of action, against the parties to the judgment, and creates a legal obligation, on their part, to restore what the other party has lost by reason of the erroneous judgment. And, as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right; but, as to strangers, there is no such privity; and, if no legal right existed, when the money was paid, to recover it back, no such right could be created by notice of an intention so to do. Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law, at the very time of payment, creates the obligation to refund it. A notice of intention to recover back the money does not, even in such cases, create the right to recover it back; that results from the illegal exaction of it, and the notice may serve to rebut the inference that it was a voluntary payment, or made through mistake." But a prize-agent, holding prize proceeds, if he pay over the money after an appeal is entered, pays it over at his own peril; for the appeal suspends the former sentence. Penhallow *v.* Doane, 3 Dall. 54. See Bamford *v.* Shuttleworth, 11 Adolph. & Ellis, 926; [Shipherd *v.* Underwood, 55 Ill. 475; Herrick *v.* Gallagher, 60 Barb. (N. Y.) 566; Langley *v.* Warner, 1 Sandf. 209; White *v.* Coleman, 127 Mass. 34; Griffin *v.* Weatherly, L. R. 3 Q. B. 753].

[1] 3 Chitty on Com. & Manuf. 213; 2 Liverm. on Agency, 264 (ed. 1818); Buller *v.* Harrison, Cowp. 565; Cox *v.* Prentice, 3 M. & Selw. 344.

[2] 3 Chitty on Com. & Manuf. 213; Boller *v.* Harrison, Cowp. 565; Mowatt *v.* M'Lellan, 1 Wend. 173.

[3] 3 Chitty on Com. & Manuf. 213; Cary *v.* Webster, 1 Str. 480; Campbell *v.* Hall, Cowp. 204; Edwards *v.* Hodding, 5 Taunt. 515; Snowden *v.* Davis, 1 Taunt. 359; Ripley *v.* Gelston, 9 John. 201; Smith on Merc. Law, 80–82 (2d ed.); Id. pp. 143, 144 (3d ed. 1843); Buller *v.* Harrison, Cowp. 565; Seidell *v.* Peckworth, 10 Serg. & R. 442; Frye *v.* Lockwood, 4 Cowen, 454; Mr. Smith (on Merc. Law, pp. 143–145, 3d ed. 1843), on this subject, says: "If the agent exceed his authority, so that his principal is not bound, he will himself be liable for the damage thus occasioned to the other contracting party, although he may have been innocent of any intention to defraud. The question, whether an agent is personally liable for money paid to him for the use of his

§ 301. Various examples might be put to illustrate this doctrine. Thus, where money has been paid to an agent to avoid an illegal principal, under circumstances which would entitle some person to recover it from that principal, involves much difficulty. In the first place, it is clear, that if the agent have without notice to act otherwise, paid over the money to his principal, he never can be called on to refund it. But in Cox *v.* Prentice, it was laid down by the court on the authority of Buller *v.* Harrison, that an agent who receives money for his principal, is liable as a principal, so long as he stands in his original situation, and until there has been a change in circumstances by his having paid over the money to his principal, or done what is equivalent to it. In that case, the defendant received a bar of silver from his principal, and sold it to plaintiff at a price calculated with reference to the number of ounces which, on assay, it was thought to contain; it turned out afterwards that it contained fewer ounces than had been supposed, and the plaintiff was held entitled to recover the money overpaid from the defendant, who had not yet handed it to his principal, although he had forwarded an account to him in which he was credited with the full sum, but which was still unsettled. In Buller *v.* Harrison, the defendant was an insurance broker; and the money sought to be recovered, was paid by the plaintiff, an underwriter, in discharge of a loss, which turned out to be foul. It will be observed that in neither of these cases could the principal himself, ever, by possibility, have claimed to retain the money for a single instant, had it reached his hands; the payment having been made by the plaintiff under pure mistake of facts, and being void, *ab initio*, as soon as that mistake was discovered, so that the agent would not have been estopped from denying his principal's title to the money any more than the factor of J. S., of Jamaica, who has received money paid to him under the supposition of his employer being J. S., of Trinidad, would be estopped from retaining that money against his employer, in order to return it to the person who paid it to him. Besides which, in Buller *v.* Harrison, had the agent paid the money he received from the underwriter, in discharge of the foul loss, over to his principal, he would have rendered himself an instrument of fraud, which, as we have already seen, no agent can be obliged to do. Except in such cases as these, the maxim, *respondeat superior*, has been applied, and the agent held responsible to no one but his principal. Thus in Stephens *v.* Badcock, the defendant, an attorney's clerk, having received by his master's orders, rents for the plaintiff, a client; it was held, that he was not responsible to the plaintiff, though his employer, the attorney, has since become a bankrupt; nor can an action for money had and received be brought against the agent who has received it on behalf of his principal, for the purpose of trying the existence of a right in that principal; thus the right of a lord of a manor cannot be tried in an action against his steward for quit-rent voluntarily paid; and these decisions are but just, since, as the agent is estopped from questioning the title of his principal, he would, but for this rule of *respondeat superior*, be frequently exposed, without any defence, to two different suits, in respect of the same subject-matter. But an agent cannot defend himself even on the ground of payment over to his principal, if he receive money illegally from a party, who is not prevented from suing him by the rule, pari delicto potior est conditio defendentis. This was decided in Miller *v.* Aris, where the money was received by a jailer from a prisoner for rent for a room illegally let to him, and paid over by the jailer to his employers. Neither do the foregoing remarks extend to cases in which the money gets into the agent's hands, in consequence

distress or an illegal claim (as to the bailiff of a sheriff, to avoid an illegal distress; or where money has been paid to a collector for an illegal duty; and notice of the objection is given to the agent or collector, before he pays it over), the party paying it may recover it back from the agent or collector, notwithstanding he has since paid it over to the principal.[1] But, if the illegality is unknown to the agent, and no objection of that sort is made before he has paid over the money, he will not be liable therefor.[2]

of a tort committed by him, under the directions of, or jointly with, his principal. Of course, if an agent pay money to his principal, which was not intrusted to him for that purpose, he will not be discharged; *ex. gr.*, if a stakeholder pay over the deposit before the condition on which it was to become due is performed." [Granger *v.* Hathaway, 17 Mich. 500. Where two cotton brokers, each acting for an undisclosed principal, and each treating the other as principal, carried out a contract, and one of them by mistake overpaid the other, who, before the mistake was discovered, had allowed his principal, who owed him largely, credit for the amount received, it was held that the amount so paid could be recovered, and the agent was not relieved from responsibility as having paid over money to his principal, Newall *v.* Tomlinson, L. R. 6 C. P. 405: but where the agent was known to be acting as such, and had paid over the money received by him to his principal without notice of any claim, he was held not liable, Shand *v.* Grant, 15 C. B. N. S. 324; East India Co. *v.* Trillon, 3 B. & C. 280. So, where A. as agent took out a policy of insurance in his own name, "on account of whom it may concern," and a loss occurred, and the insurance was paid to him, and he at once paid the same to his principal, and it turned out that neither he nor his principal had an insurable interest in the goods insured, it was held that the money could not be recovered from him, as he had no notice of any adverse claim nor reason to suspect any. Hooper *v.* Robinson, 98 U. S. 528. — ED.]

[1] Post, § 307; Snowden *v.* Davis, 1 Taunt. 359; Edwards *v.* Hodding, 5 Taunt. 815; Ripley *v.* Gelston, 9 John. 201; Bank of United States *v.* Bank of Washington, 6 Peters, 8, 19; Tracy *v.* Swartwout, 10 Peters, 80; Elliot *v.* Swartwout, 10 Peters, 137; Frye *v.* Lockwood, 4 Cowen, 454; Smith on Merc. Law, 82 (2d ed.); Id. Pt. 1, ch. 5, § 7, pp. 143–145 (3d ed. 1843); Bend *v.* Hoyt, 13 Peters, 263; Allen *v.* M'Keen, 1 Sumner, 277, 278, 317; Miller *v.* Aris, 3 Esp. 231; s. c. cited Selwyn's Nisi Prius, 93 (8th ed.); Paley on Agency, by Lloyd, 393, 394. Mr. Paley has remarked, in p. 389: "It seems, however, that the right to recover against the agent is to be understood with some qualification. For it has been held, that an action will not lie against a mere collector or receiver, for the purpose of trying a right in the principal, even though he have not paid over the money. It is said in one case, that if the defendant can show the least color of right in his principal, it is sufficient. And Lord Chief Justice Lee declared, that the right to an inheritance should not be tried in an action for money had and received, brought against the receiver. In a case where the question was much considered, it was held, that an action could not be supported against a steward for quit-rent voluntarily paid, in order to bring the lord's right in question, but that it must be against the lord." [First National Bank *v.* Watkins, 21 Mich. 483.]

[2] Ibid.; Snowden *v.* Davis, 1 Taunt. 359; Edwards *v.* Hodding, 5 Ib. 815.

CHAPTER XI.

LIABILITIES OF PUBLIC AGENTS ON CONTRACTS.

§ 302. HITHERTO we have been considering the personal liability of agents on contracts with third persons, in cases of mere private agency. But a very different rule, in general, prevails in regard to public agents; for, in the ordinary course of things, an agent, contracting in behalf of the government, or of the public, is not personally bound by such a contract, even though he would be by the terms of the contract, if it were an agency of a private nature.[1]

[1] Macbeath *v.* Haldimand, 1 T. R. 172; Bowen *v.* Morris, 2 Taunt. 374, 387; Unwin *v.* Woolseley, 1 T. R. 674; Brown *v.* Austin, 1 Mass. 208; Dawes *v.* Jackson, 9 Mass. 490; Walker *v.* Swartwout, 12 John. 444; 3 Chitty on Com. & Manuf. 213, 214; Bainbridge *v.* Downie, 6 Mass. 253; Fox *v.* Drake, 8 Cow. 191; Osborne *v.* Kerr, 12 Wend. 179; Jones *v.* La Tombe, 3 Dall. 384; Rathbone *v.* Budlong, 15 John. 1; Mott *v.* Hicks, 1 Cow. 513; Sheffield *v.* Watson, 3 Caines, 69; Bronson *v.* Woolsey, 17 John. 46; Hodgson *v.* Dexter, 1 Cranch, 345, 363, 364; Post, § 306, note; Bernard *v.* Torrance, 5 Gill & John. 383; Enloe *v.* Hall, 1 Humph. (Tenn.) 303. [Thus, an agent of a foreign government is not liable as such to any action, and a party cannot indirectly sue a foreign government by bringing a suit against its agent. Twycross *v.* Dreyfus, L. R. 5 Ch. D. 605. And a government agent is not personally liable where the party he deals with knows he is such agent, and a promise made by him to pay the debt, when he receives money from his principal will not make him personally liable therefor. Brazelton *v.* Colyar, 2 Bax. (Tenn.) 234. This is the rule with regard to contracts made by such an agent within the scope of his agency; but if he should deny to his government that he had entered into a contract, and thereby prevent the other party from having a remedy against the government, he would be personally liable. Freeman *v.* Otis, 9 Mass. 272. So, if he gives a creditor of the government his own check on a bank and takes a receipt, upon which he procures an allowance from his principal as for an amount paid by him. Taylor *v.* Wilson, 11 Metc. 44. Nor can such agent sue on such contracts in his own name. Gray *v.* Paxton, Quincy (Mass.), 541. See Ghent *v.* Adams, 2 Kelly, 214; Copes *v.* Matthews, 10 Sm. & Mar. 398; Parks *v.* Ross, 11 How. 362; Tutt *v.* Hobbs, 17 Mo. 486; Miller *v.* Ford, 4 Rich. 376; Dwinelle *v.* Henriquez, 1 Cal. 387; Ogden *v.* Raymond, 22 Conn. 379; Nichols *v.* Moody, 22 Barb. 611; Hammarskold *v.* Bull, 11 Rich. 493. And under the provisions of the Act of July 2, 1864, for the purchase of products of the States in insurrection, a purchasing agent had no power to incur any liability on behalf of the government previous to the actual delivery of the goods. Noble *v.* U. S. 11 Ct. of Claims, 608. — ED.]

The reason of the distinction is, that it is not to be presumed, either that the public agent means to bind himself personally, in acting as a functionary of the government, or that the party dealing with him in his public character means to rely upon his individual responsibility.[1] On the contrary, the natural presumption in such cases is, that the contract was made upon the credit and responsibility of the government itself, as possessing an entire ability to fulfil all its just contracts, far beyond that of any private man;[2] and that it is ready to fulfil them not only with good faith, but with punctilious promptitude, and in a spirit of liberal courtesy. Great public inconveniences would result from a different doctrine, considering the various public functionaries, which the government must employ, in order to transact its ordinary business and operations; and many persons would be deterred from accepting important offices of trust under the government, if they were held personally liable upon all their official contracts.[3] Take one example only: Every officer in the army or navy, from the commander-in-chief downwards, who should enter into any official contract, or give any orders which should involve a contract, as, for example, a contract for supplies, or for provisions, or for military materials, might be held personally liable thereon, to his utter ruin.[4] By parity of reasoning, upon any such contract, entered into by a public agent on behalf of the government, no suit lies by him; but it must be brought in the name of the government, against the other contracting party.[5]

§ 303. This principle not only applies to simple contracts both parol and written, but also to instruments under seal, which are executed by agents of the government in their own names, and purporting to be made by them on behalf of the government; for the like presumption prevails in such cases, that the parties contract, not personally, but merely officially, within the sphere of their appro-

[1] 2 Kent, Comm. Lect. 41, pp. 632, 633 (4th ed.); [Crowell *v.* Crispin, 4 Daly (N. Y.), 100].

[2] Tippets *v.* Walker, 4 Mass. 595, 597; 2 Kent, Comm. Lect. 41, pp. 632, 633 (4th ed.).

[3] Macbeath *v.* Haldimand, 1 T. R. 172, 181, 182; Hodgson *v.* Dexter, 1 Cranch, 345, 363, 364; Jones *v.* La Tombe, 3 Dall. 384; [Reed *v.* Conway, 26 Mo. 13].

[4] Macbeath *v.* Haldimand, 1 T. R. 172, 180-182; Hodgson *v.* Dexter, 1 Cranch, 345, 363, 364; Bronson *v.* Woolsey, 17 John. 46; Belknap *v.* Reinhart, 2 Wend. 375.

[5] Bainbridge *v.* Downie, 6 Mass. 253; Bowen *v.* Morris, 2 Taunt. 374; Irish *v.* Webster, 5 Greenl. 171.

priate duties.[1] Thus, a charter-party, sealed and executed by a public officer in his own name, but describing himself as acting on behalf of the king or government, for purposes connected with the public service, has been held not to bind him personally, but to be merely obligatory upon the government.[2] So, an indenture, executed between A. B., describing himself as "secretary of war," of the one part, and C. D. of the other part, for a demise of certain buildings for public purposes, and for a certain period, and containing a covenant, on the part of A. B., to pay the stipulated rent during that period, has been held not to bind A. B. personally; but to bind the government alone.[3]

§ 304. The same principle applies to cases, where public officers, contracting for a public purpose, afterwards, upon a settlement of accounts with the other contracting party, strike a balance, and in writing promise to pay that balance on a specific day, signing their names, with their official designations annexed, as, for example, as commissioners; for such a written document is quite consistent with an intention not to incur any personal responsibility; but merely to apply the public funds, which might be in their hands at the time prescribed, towards the discharge of the public debt.[4]

§ 305. The same principle applies to the case, where a public officer receives moneys officially, for the purpose of applying the same to the discharge of the debts, or allowances, of the government; for, in such a case, he acts merely as an agent of the government, and the only obligation or duty, which arises, is to the government, from his official character; and not any personal responsibility to third

[1] 3 Chitty on Com. & Manuf. 213, 214; Stinchfield *v.* Little, 1 Greenl. 231; Macbeath *v.* Haldimand, 1 T. R. 172, 181, 182; Hodgson *v.* Dexter, 1 Cranch, 345, 363, 364; Osborne *v.* Kerr, 12 Wend. 179; Walker *v.* Swartwout, 12 John. 444; Bowen *v.* Morris, 2 Taunt. 379; Smith on Merc. Law, B. 1, ch. 5, § 7, pp. 141, 142 (3d ed. 1843). [Thus, a member of the militia cannot maintain an action against the colonel of his regiment for services performed pursuant to a military order. Savage *v.* Gibbs, 4 Gray, 601. And the rule, as stated in the text, has been applied to a note given by "R., trustee," on behalf of the trustees of a school district, Hodges *v.* Runyan, 30 Mo. 491, and no action lies by a parent against the teacher of a town school for refusing to instruct his children. Spear *v.* Cummings, 23 Pick. 224. — Ed.]

[2] Unwin *v.* Woolseley, 1 T. R. 674, 678; Walker *v.* Swartwout, 12 John. 444.

[3] Hodgson *v.* Dexter, 1 Cranch, 345, 363, 364.

[4] Fox *v.* Drake, 8 Cowen, 191. In this case it was said that he would be personally liable, if he had public funds in his hands at the time. But see Post, § 305, note; [Brazelton *v.* Colyar, 2 Bax. (Tenn.) 234].

persons. Hence, it has been held, that no suit will lie against a person, who is secretary of war, for refusing to pay over moneys, which he has received to distribute among certain claimants, as retiring allowances, bestowed upon them by the bounty of the government.[1]

[1] Gidley *v.* Lord Palmerston, 3 Brod. & Bing. 275. On the occasion of delivering the opinion of the court in Gidley *v.* Lord Palmerston, Lord Chief Justice Dallas said: "On these facts, the question arises, whether, upon all or any of the counts in the declaration, the present action can be maintained; and we think, that it cannot be maintained. It is not pretended, that the defendant is to be charged in respect of any express undertaking, or agreement, between him and the testator, or in respect of any other character than his public and official character of secretary at war. It is in that character, and in that only, that his duty is alleged to arise; being, therefore, a duty as between him and the crown only, and not resulting from any relation to, or employment by, the plaintiff, or under any undertaking in any way to be personally responsible to him. The money received is granted by the crown, subject only to the disposition or control of the defendant, as the agent or officer of the crown, and responsible to the crown for the due execution of the trust or duty so committed. There is, therefore, no duty, from which the law can imply a promise to pay the testator, during his life, or to his executor after his death; nor can money be said to have been had and received to the use of the testator, which money belonged to the crown, being received as the money of the crown, and the party receiving it being responsible only to the crown in his public character. On this view of the case, it appears to us, that this action cannot be maintained. But it must fail also on another and a wider ground. This is an action brought against the defendant, as paymaster-general, for an alleged breach of an implied undertaking, said to attach upon him in that character. With reference to this ground, it will be sufficient to advert to a class of cases, too well known and established to require to be more particularly mentioned, and which in substance and result have established, that an action will not lie against a public agent for any thing done by him in his public character, or employment, though alleged to be, in the particular instance, a breach of such employment, and constituting a particular and personal liability. Such persons, said Lord Mansfield, in one of the cases cited at the bar, are not understood personally to contract; and, in the same case, it was observed, by Mr. Justice Ashurst, 'In great questions of policy, we cannot argue from the nature of private agreements.' 'Great inconveniences would result from considering a governor, or commander, as personally responsible.' 'No man would accept of any office or trust under government upon such conditions. And, indeed, it has frequently been determined, that no individual is answerable for any engagements, which he enters into on their behalf. There is no doubt but the crown will do ample justice to the plaintiff's demands, if they be well founded.' Mr. Justice Buller, in the case, added: 'Where a man acts as agent for the public, and treats in that capacity, there is no pretence to say, that he is personally liable.' And, in a subsequent case, it is held, that a servant of the crown, contracting on the part of the government, is not personally answerable. I am aware that these cases are not, in their circumstances, precisely similar to the present; and, perhaps, in respect of some of the circumstances belonging to the

§ 306. But, although this is the general rule in relation to public agents, yet it is founded upon a mere presumption, and is liable to be rebutted by circumstances, which clearly establish an intention between the parties to the contract to create and rely upon a personal responsibility on the part of a public agent.[1] For there is nothing in the general principles or policy of the law, which forbids an agent from waiving his official immunity, and from making himself personally responsible on any contract, made for and on behalf of the government. Where it is not known to the other party, that the agent is acting for the public, it may fairly be presumed, that he intends to trust to the personal credit and responsibility of the agent, even although it may not be to his exclusive credit and responsibility.[2] But the same result may arise, where there is an express personal responsibility, incurred by a known public agent; or where it may fairly be implied from all the attendant circumstances.[3] In cases of such an implied responsibility, the proofs ought to be exceedingly cogent and clear, in order to create such personal responsibility in a known public agent, and to repel the presumption of law, that he contracts only on the credit of the government.[4] The same prin-

present case, I may personally have doubted longer than, I am now satisfied, I ought to have done. But, in their doctrine, they go to this, that, on principles of public policy, an action will not lie against persons, acting in a public character and situation, which, from their very nature, would expose them to an infinite multiplicity of actions; that is, to actions at the instance of any person who might suppose himself aggrieved. And, though it is to be presumed, that actions improperly brought would fail, and, it may be said, that actions properly brought should succeed; yet, the very liability to an unlimited multiplicity of suits would, in all probability, prevent any proper or prudent person from accepting a public situation, at the hazard of such peril to himself." But see Myrtle *v.* Beaver, 1 East, 135; Rice *v.* Chute, 1 East, 579; Freeman *v.* Otis, 9 Mass. 272; Fox *v.* Drake, 8 Cowen, 191; Ante, § 304, and note. *Quære*, if a writ of mandamus might not lie, in such a case, to compel the officer to pay over the public funds in his hands, if appropriated to that purpose? See Kendall, Postmaster-General *v.* United States, 12 Pet. 527. There is some difficulty in reconciling all the authorities, as to the non-payment of moneys in their hands, and other omissions of duty by public officers; and as to the point how far, and when they are responsible to third persons. See Rowning *v.* Goodchild, 3 Wilson, 443; s. c. 5 Burr. 2716; Stock *v.* Harris, 5 Burr. 2709; Barnes *v.* Foley, 5 Burr. 2711; Bend *v.* Hoyt, 13 Pet. 263.

[1] [Copes *v.* Matthews, 10 Sm. & Mar. 398; Johnson *v.* Common Council, 16 Ind. 227; Sanborn *v.* Neal, 4 Min. 126.]

[2] Swift *v.* Hopkins, 13 John. 313.

[3] Macbeath *v.* Haldimand, 1 T. R. 172, 180, 182; Gill *v.* Brown, 12 John. 385; Freeman *v.* Otis, 9 Mass. 272.

[4] Ibid.; Bainbridge *v.* Downie, 6 Mass. 253; Freeman *v.* Otis, 9 Mass. 272;

ciple, with the same qualifications, prevails in the Scottish law. A public agent is not ordinarily liable on a contract made by him on behalf of the government; but he may, if he pleases, incur a personal liability on such contract; and he will be deemed so to intend, when he draws a bill or note in his own name under the contract.[1]

§ 307. Where, however, money is obtained from third persons, by public officers, illegally, but under color of office, it may be recovered back from them, if notice has been given by the party, at the time, to the officer, although the money has been paid over to the government; and if it has not been paid over, but it remains in the officer's hands, it may be recovered back, even without notice.[2] And it will make no difference in the case, that the payment was originally made under a misconception or misconstruction of the law, by both or by either of the parties.[3] We shall hereafter have occasion to examine, how far, and under what circumstances, public agents are liable for their own torts, and for the torts of sub-agents employed by or under them.[4]

§ 307 *a*. In respect to the acts and declarations and representations of public agents, it would seem that the same rule does not prevail, which ordinarily governs in relation to mere private agents. As to the latter (as we have seen), the principals are in many cases bound, where they have not authorized the declarations and representations to be made.[5] But, in cases of public agents, the government, or other public authority, is not bound, unless it manifestly appears that the agent is acting within the scope of his authority, or he is

Dawes *v.* Jackson, 9 Mass. 490; Osborne *v.* Kerr, 12 Wend. 179; Belknap *v.* Reinhart, 2 Wend. 375; Fox *v.* Drake, 8 Cowen, 191. It seems almost impossible to reconcile the case of Sheffield *v.* Watson, 3 Caines, 69, with the principles here laid down; or, indeed, with the general bearing of the other authorities on this subject. Indeed, it was shaken to its foundation by the decision in Walker *v.* Swartwout, 12 John. 444, 448. [It is a question for the jury, to whom credit was given. Brown *v.* Rundlett, 15 N. H. 360; Hammarskold *v.* Bull, 9 Rich. 484.]

[1] Thomson on Bills of Exchange, 229, 230 (2d ed. 1836).

[2] Ante, § 301; Barnes *v.* Foley, 5 Burr. 2711; Frye *v.* Lockwood, 4 Cowen, 454; Tracy *v.* Swartwout, 10 Pet. 80; Elliot *v.* Swartwout, 10 Pet. 137; Ripley *v.* Gelston, 9 John. 201; Ante, § 300, and note. See Bend *v.* Swartwout, 13 Pet. 263.

[3] Barnes *v.* Foley, 5 Burr. 2711; Tracy *v.* Swartwout, 10 Pet. 80; Elliot *v.* Swartwout, 10 Pet. 137; Ripley *v.* Gelston, 9 John. 201; Ante, § 300, and note. See Bend *v.* Swartwout, 13 Pet. 263.

[4] Post, §§ 320–322.

[5] Ante, §§ 126, 133, 134.

held out as having authority to do the act, or is employed, in his capacity as a public agent, to make the declaration or representation for the government. Indeed, this rule seems indispensable, in order to guard the public against losses and injuries arising from the fraud or mistake, or rashness and indiscretion of their agents.[1] And there is no hardship in requiring from private persons, dealing with public officers, the duty of inquiry, as to their real or apparent power and authority to bind the government.

[1] Lee *v.* Munroe, 7 Cranch, 366. [A statute limiting the amount of an expenditure is notice in law and in fact to the contractor that the officers of the government cannot exceed the prescribed bounds. If they are exceeded, the claimant must be deemed to have gone beyond the fixed limit at his own risk. Curtis *v.* United States, 2 Nott & Hun. (Ct. of Claims) 144; Baltimore *v.* Reynolds, 20 Md. 1; State *v.* Hastings, 10 Wis. 518; Hull *v.* County of Marshall, 12 Iowa, 142. Where a public agent contracts by a writing showing on its face that he acts officially, though he does not add his official designation to his signature, he is not bound personally. Lyon *v.* Adamson, 7 Clarke (Iowa), 509. By the law of agency at the common law there is this difference between individuals and the government: the former are liable to the extent of the power they have apparently given to their agents, while the government is liable only to the extent of the power it has actually given to its officers. Per Loring, J., Pierce *v.* United States, 1 Nott & Hun. (Ct. of Claims) 270; s. c. *nom.* The Floyd Acceptances, 7 Wall. 666; State *v.* Hayes, 52 Mo. 578. See Grant *v.* United States, 5 Nott & Hun. (Ct. of Claims) 71.

The question how far a public officer makes himself personally responsible for the performance of a contract which he makes in his official capacity, but which fails to bind the municipality on whose behalf he assumed to act, by reason of some informality in the proceedings of such officer, is extensively discussed by Bennett, J., in Ives *v.* Hulet, 12 Vt. 314, and by Chief Justice Williams, dissenting from the opinion of the court, by which the officer was held personally responsible. — R.] [And see Whiteside *v.* United States, 93 U. S. 247.]

CHAPTER XII.

LIABILITY OF AGENTS FOR TORTS.

§ 308. We come, in the next place, to the consideration of the liability of agents to third persons, in regard to torts or wrongs done by them in the course of their agency; and this liability may be either of private agents or of public agents. Let us first consider that of private agents. And here the distinction ordinarily taken is between acts of misfeasance or positive wrongs and nonfeasances or mere omissions of duty by private agents. The law upon this subject as to principals and agents is founded upon the same analogies as exist in the case of masters and servants. The master is always liable to third persons for the misfeasances and negligences and omissions of duty of his servant, in all cases within the scope of his employment.[1] So the principal, in like manner, is liable to third persons for the like misfeasances, negligences, and omissions of duty of his agent, leaving him to his remedy over against the agent in all cases, where the tort is of such a nature as that he is entitled to compensation.[2] And this liability is not limited to principals who

[1] Com. Dig. Action on the Case for Negligence, A. 2, A. 5, A. 6; 3 Chitty on Com. & Manuf. 214; Story on Bailm. § 400; Morse *v.* Slue, 1 Vent. 238; Clarke *v.* City Corporation of Washington, 12 Wheat. 40; Randleson *v.* Murray, 3 Nev. & Perry, 239; s. c. 8 Adolph. & Ellis, 109; Ante, § 217. [See Bank of Ky. *v.* Adams Ex. Co., 93 U. S. 174; Burns *v.* Poulsom, L. R. 8, C. P. 563; Commonwealth *v.* Holmes, 119 Mass. 195; Montague *v.* Boston & Albany R. R. Co., 124 Mass. 242; Caswell *v.* Cross, 120 Mass. 545; Fletcher *v.* Sibley, 124 Mass. 220.]

[2] Lane *v.* Cotton, 12 Mod. 488, 489; Perkins *v.* Smith, Sayer, 40, 41; Post, §§ 452, 457. See also Quarman *v.* Burnett, 6 Mees. & Wels. 499; Priestly *v.* Fowler, 3 Mees. & Wels. 1; Milligan *v.* Wedge, 12 Adolph. & Ellis, 737, 742; Schieffelin *v.* Harvey, 6 John. 170; Post, §§ 452–457; United States *v.* Halberstadt, 1 Gilp. 262. As to the cases in which a principal may recover compensation from his agent, for the tort of the latter, see Farebrother *v.* Ansley, 1 Camp. 343; Ante, § 201. As to the cases in which an agent may, or may not, recover compensation for torts done by authority of his principal, see Merryweather *v.* Nixon, 8 T. R. 186; Farebrother *v.* Ansley, 1 Camp. 343; Stephens *v.* Elwall, 4 M. & Selw. 259, 261; Martyn *v.* Blithman, Yelv. 197; Fletcher *v.*

are mere private persons, but extends also to private corporations, for the misfeasances, negligences, and omissions of duty of their agents, in the course of their employment, whenever they are duly appointed.[1] The agent is also personally liable to third persons for

Harcott, Hutton, 55; Adamson *v.* Jarvis, 4 Bing. 66. In this last case, Lord Chief Justice Best, in delivering the opinion of the court, said: "Auctioneers, brokers, factors, and agents do not take regular indemnities. These would be indeed surprised, if, having sold goods for a man, and paid him the proceeds, and having suffered afterwards in an action at the suit of the true owners, they were to find themselves wrong-doers, and could not recover compensation from him who had induced them to do the wrong. It was certainly decided in Merryweather *v.* Nixon, that one wrong-doer could not sue another for contribution. Lord Kenyon, however, said: 'that the decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right.' This is the only decided case on the subject, that is intelligible. There is a case of Walton *v.* Hanbury and others, but it is so imperfectly stated that it is impossible to get at the principle of the judgment. The case of Phillips *v.* Briggs was never decided. But the Court of Chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint-obligors. From the inclination of the court on this last case, and from the concluding part of Lord Kenyon's judgment in Merryweather *v.* Nixon, and from reason, justice, and sound policy, the rule, that wrong-doers cannot have redress, or contribution, against each other, is confined to cases, where the person seeking redress must be presumed to have known that he was doing an unlawful act. If a man buys the goods of another, from a person who has no authority to sell them, he is a wrong-doer to the person whose goods he takes; yet, he may recover compensation against the person who sold the goods to him, although the person who sold them did not undertake that he had a right to sell, and did not know that he had no right to sell. That is proved by Medina *v.* Stoughton, Sanders *v.* Powell, Crosse *v.* Gardner, and many other cases. These cases rest on this principle, that, if a man having the possession of property, which gives him the character of owner, affirms that he is owner, and thereby induces a man to buy, when, in point of fact, the affirmant is not the owner, he is liable to an action. It has been said that he is, because there is a breach of contract to rest the action on, and that there is no contract in this case. This is not the true principle. It is this: he who affirms, either what he does not know to be true, or knows to be false, to another's prejudice and his own gain, is, both in morality and law, guilty of falsehood, and must answer in damages."

[1] Yarborough *v.* Bank of England, 16 East, 6; Smith *v.* The Birmingham Gas Company, 1 Adolph. & Ellis, 526; Salem Bank *v.* Gloucester Bank, 17 Mass. 1; Foster *v.* Essex Bank, 17 Mass. 479; Riddle *v.* Proprietors of Locks and Canals on Merrimack River, 7 Mass. 169; Townsend *v.* Susquehannah Turnpike Road, 6 John. 90; Gray *v.* Portland Bank, 3 Mass. 364; Fowle *v.* Common Council of Alexandria, 3 Peters, 398, 409; Rabasса *v.* Orleans Navigation Co. 5 Miller (La.), 463, 464; 2 Kent, Comm. Lect. 33, p. 283 (4th ed.); Goodloe *v.* City of Cincinnati, 4 Hamm. (Ohio) 500. [This rule is fully supported by the decisions of the courts with regard to all classes of corporations. Stainbank *v.* Fernley, 9 Sim. 556; Green *v.* London Omnibus Co., 7 J.

his own misfeasances and positive wrongs.[1] But he is not, in general (for there are exceptions), liable to third persons for his own

Scott, 290; Whitfield *v.* So. East R. Co., 1 El. Bl. & El. 115; Hay *v.* Cohoes Co., 3 Barb. 42; Vinas *v.* Merch. Mut. Ins. Co., 27 La. Ann. 367; Fox *v.* Adams Ex. Co., 116 Mass. 292; Weir *v.* Barnett, L. R. 3 Ex. D. 32; Peek *v* Gurney, L. R. 6 H. L. 377.

Thus, for instance, corporations are bound by the frauds of their agents, in inducing parties to subscribe to stock by making fraudulent misrepresentations, Western Bank *v.* Addie, L. R. 1 H. L. 145; Nat. Ex. Co. *v.* Drew, 2 Macq. 103; Mackay *v.* Com. Bank, L. R. 5 P. C. 394; provided the agent had authority to make the contract about which he has made misrepresentations; First Nat. Bank *v.* Hurford, 29 Iowa, 579; Buffalo, &c. R. Co. *v.* Dudley, 14 N. Y. 336; No. Car. R. R. Co. *v.* Leach, 4 Jones, L. 340; Henderson *v.* Lacon, L. R. 5 Eq. 249; Goodrich *v.* Reynolds, 31 Ill. 490. Although any extended note on the subject would be foreign to the purposes of this work, a short résumé of the liabilities of some particular corporations may be found useful in this place; thus: —

Telegraph Companies are liable for the negligence or carelessness of their servants and employés in the transmission of the messages delivered to them, or for unnecessary delay therein, or for failure to transmit them. Rittenhouse *v.* Ind. Tel. Co., 44 N. Y. 263; De la Grange *v.* So. West. T. Co., 25 La. Ann. 383; Tyler *v.* West. Un. Tel. Co., 60 Ill. 440; Bartlett *v.* West. Un. Tel. Co., 62 Me. 209; Baldwin *v.* U. S. Tel. Co., 45 N. Y. 744; Sprague *v.* W. U. Tel. Co., 6 Daly, 200; De Rutte *v.* N. Y. Tel. Co., 1 Daly, 547; N. Y. &c. Tel. Co. *v.* Dryburg, 35 Pa. St. 298; Squire *v.* W. U. Tel. Co., 98 Mass. 232; W. U. Tel. Co. *v.* Ferguson, 57 Ind. 495. A telegraph company can, however, limit its liability by a stipulation upon its blanks that it will not be liable for errors in transmission, unless the message is repeated at the expense of the sender, West. Un. Tel. Co. *v.* Carew, 15 Mich. 525; Redpath *v.* W. U. Tel. Co., 112 Mass. 71; Camp *v.* W. U. Tel. Co., 1 Metc. (Ky.) 164; Birney *v.* N. Y. Tel. Co., 18 Md. 341; Plassmore *v.* W. U. Tel. Co., 78 Pa. St. 238; Ellis *v.* Am. Tel. Co., 13 Allen, 226: though this has been denied, W. U. Tel. Co. *v.* Tyler, 74 Ill. 168: nor for errors made by connecting lines over which the message is to be forwarded by them, W. U. Tel. Co. *v.* Carew, 15 Mich 525; De la Grange *v.* So. W. Tel. Co., 25 La. Ann. 383. But it cannot escape liability by any such stipulation that it will not be liable for the negligence or carelessness of its servants. U. S. Tel. Co. *v.* Gildersleeve, 29 Md. 232; W. U. Tel. Co. *v.* Fontaine, 58 Ga. 433; True *v.* Int. Tel. Co., 60 Me. 9; Grinnell *v.* W. U. Tel. Co., 113 Mass. 299; Breese *v.* U. S. Tel. Co., 48 N. Y. 132; Sweatland *v.* Ill. Tel. Co., 27 Iowa, 433. In England it has been held that the receiver of a message has no contract with the telegraph company, and that the latter is not liable to him for negligence. Dickson *v.* Reuters Tel. Co., L. R. 2 C. P. D. 62, 3 C. P. D. 1; Playford *v.* Un. King. Tel. Co., L. R. 4 Q. B. 706. But in this country such companies are held to be the agents of both parties, and liable to both for acts of negligence on the part of their servants. N. Y. Tel. Co. *v.* Dryburg, 35 Pa. St. 303; Elwood *v.* West. Un. Tel. Co., 45 N. Y. 549; Bank *v.* W. U. Tel. Co., 52 Cal. 280; Rose *v.* U. S. Tel. Co., 3 Abb. Pr. N. S. 408; W. U. Tel. Co. *v.* Fenton, 52 Ind. 1; De Rutte *v.* N. Y. &c. Tel. Co.,

[1] Story on Bailm. § 404; Post, § 320; [Bell *v.* Joslyn, 3 Gray, 309].

nonfeasances or omissions of duty, in the course of his employment.[1] His liability, in these latter cases, is solely to his principal;[2] there

1 Daly, 547; Leonard *v.* N. Y. &c. Tel. Co., 41 N. Y. 544. So the sender of the message is held not liable for mistakes made by the telegraph company in transmission, as the latter is only a special agent to send the message in the terms on which it is delivered to the company, Henkel *v.* Pape, L. R. 6 Ex. 7; Verdin *v.* Robertson, 10 Ct. Sep. (3d Series) 35; Dunning *v.* Roberts, 35 Barb. 463: but this has been denied, Saveland *v.* Green, 40 Wisc. 431.

Municipal Corporations are not liable for damages sustained by parties from the negligence of their servants in the performance of their public duties; but they are liable for acts done for them as private corporations and in the management of property held by them in such capacity. Thus, a municipal corporation was held to be liable to a party falling into a dangerous excavation on the grounds of a city building used in part for municipal purposes, and in part rented to private persons, Oliver *v.* Worcester, 102 Mass. 489; West *v.* Brockport, 16 N. Y. 161; Thayer *v.* Boston, 19 Pick. 511: and a city was held to be liable for damages caused by the non-repair of a wharf for which it received tolls, Macauley *v.* New York, 67 N. Y. 602: and for the sinking of a vessel from striking an iron cylinder left upon one of the city's wharves, Memphis *v.* Kimbrough, 12 Heisk. 133; Pittsburgh *v.* Grier, 22 Pa. St. 54; Taylor *v.* New York, 4 E. D. Smith, 559: and for the negligence of persons employed by its officers in the repair or construction of public sewers, Lloyd *v.* New York, 5 N. Y. 369; Joliet *v.* Harwood, 86 Ill. 110; Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463; Sprague *v.* Tripp, 15 Am. L. Rev. 66; People *v.* Albany, 11 Wend. 539; Mayor of New York *v.* Furze, 3 Hill, 612; Barton *v.* Syracuse, 36 N. Y. 54: and for injuries caused by the breaking away of a dam connected with its water-works, Bailey *v.* New York, 3 Hill, 531: and for injuries caused by the decay of a sea-wall, which the city corporation was bound to repair under the terms of a grant from the Crown, Henley *v.* Mayor of Lyme Regis, 2 Cl. & F. 331: and for injuries resulting from the negligence of subordinate officers or agents in the construction of public improvements belonging to such corporation, Scott *v.* Manchester, 2 H. & N. 204; Lloyd *v.* New York, 5 N. Y. 369; Clark *v.* Mayor of Washington, 12 Wheat. 40; Goodloe *v.* Cincinnati, 4 Ohio, 500; Kobs *v.* Minneapolis, 22 Minn. 159: and for negligence in constructing and maintaining bridges or culverts in a highway over a navigable stream, so that water flows back and injures a land-owner, Anthony *v.* Adams, 1 Met. 284; Lawrence *v.* Fairhaven, 5 Gray, 110; Parker *v.* Lowell, 11 Gray, 353; Wheeler *v.* Worcester, 10 Allen, 591; Rhodes *v.* Cleveland, 10 Ohio, 159; Weightman

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[1] Post, §§ 314, 315; Lane *v.* Cotton, 12 Mod. 488; s. c. 1 Ld. Raym. 646, 655; 3 Chitty on Com. & Manuf. 214; Story on Bailm. §§ 400, 404, 507; Perkins *v.* Smith, Sayer, 40, 42. [An agent, however, has been held to be liable in trover for conversion, where he delivered property in his hands to the wrong owner, although his action was for the benefit of his principal. Davis *v.* Vernon, 6 Q. B. 443; Cranch *v.* White, 1 Bing. (N. C.) 414. But an agent of a factor is not liable to a third person for failing to transmit the latter's orders to his principal as to the sale of cotton consigned to the factor. Reid *v.* Humber, 49 Ga. 207. See Guernsey *v.* Cook, 117 Mass. 548; Brown Paper Co. *v.* Dean, 123 Mass. 267; Dayton *v.* Pease, 4 Ohio St. 80. — Ed.]

[2] [See Henshaw *v.* Noble, 7 Ohio St. 231.]

being no privity between him and such third persons, but the privity exists only between him and his principal.[1] And hence the

v. Washington, 1 Black, 39: and for emptying a sewer upon the land of the plaintiff without authority, Proprietors, &c. *v.* Lowell, 7 Gray, 223; Hildreth *v.* Lowell, 11 Gray, 345; Haskell *v.* New Bedford, 108 Mass. 208.

Banks are liable for the negligence of their officers and servants in the performance of their respective duties. The liability of banks as collecting agents, where the ordinary clerks and agents are employed, is well settled; but where a note is left with a bank for collection, and it is sent to a corresponding bank to collect, the question whether the bank which receives the note for collection, or the collecting bank, is the agent of the owner of the note, and alone responsible for negligence to the owner, has become one of great difficulty. In Allen *v.* Merchants' Bank, 22 Wend. 215; Reeves *v.* State Bank of Ohio, 8 Ohio St. 465; Dodge *v.* Freedmen's Sav. &c. Co., 93 U. S. 379; American Express Co. *v.* Haire, 21 Ind. 4; Indig *v.* Nat. City Bank, 80 N. Y. 100; Citizens' Bank *v.* Howell, 8 Md. 530, the court held that the bank receiving the note for collection is bound to select a suitable sub-agent, for whose negligence it binds itself and becomes responsible; while in Warren Bank *v.* Suffolk Bank, 10 Cush. 582; East Haddam Bank *v.* Scovil, 12 Conn. 303; Bellemire *v.* Bank of U. S., 4 Whart. 105; Ætna Ins. Co. *v.* Alton City Bank, 25 Ill. 243; Daly *v.* Butchers' Bank, 56 Mo. 94, it was held that the collecting bank becomes the agent of the owner, and the latter can look only to it for reimbursement. The owner can also sue the corresponding bank where it attempts to hold the proceeds of a collection in satisfaction of a debt due to it from the receiving bank. Milliken *v.* Shapleigh, 36 Mo. 596; Bank of Metropolis *v.* New Eng. Bank, 6 How. 212; Jones *v.* Milliken, 41 Pa. St. 252. A bank has been held responsible also for the negligence of its notary employed to make the ordinary demand and protest of notes, but this liability has been doubted in many cases. Gerhardt *v.* Boatmen's Savings Inst., 38 Mo. 60: Ayrault *v.* Pacific Bank, 47 N. Y. 570; Hyde *v.* Planters' Bank, 17 La. An. 560; Citizens' Bank *v.* Howell, 8 Md. 530. A bank is always responsible, however, for unreasonable delay of its officers in presenting promissory notes left with them for collection to the makers for payment, and in notifying the indorsers, Bank *v.* Kenan, 76 No. Car. 340; Chapman *v.* McCrea, 63 Ind. 360; Fabens *v.* Mercantile Bank, 23 Pick. 330; Fishkill Sav. Inst. *v.* Nat. Bank, 80 N. Y. 162: and for negligence in failing to give notice of the miscarriage of important letters, First Nat. Bank *v.* Bank of Denver, 4 Hill, C. C. 290: and for the negligent delivery by its teller of certain bonds, left on special deposit, to the wrong party, Lancaster Bank *v.* Smith, 12 P. F. Smith, 54. But banks "are not responsible for special deposits stolen by one of their officers, any more than if stolen by a stranger," unless there was gross negli-

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[1] Lane *v.* Cotton, 12 Mod. 488; s. c. 1 Ld. Raym. 646, 655; Perkins *v.* Smith, Sayer, 40, 42; Cameron *v.* Reynolds, Cowp. 403; Rowning *v.* Goodchild, 5 Burr. 2721; s. c. 3 Wils. 454; Story on Bailm. §§ 402, 404; Smith on Merc. Law, 82 (2d ed.); Id. 145, 146 (3d ed. 1843); Morse *v.* Slue, 1 Vent. 238; Quarman *v.* Burnett, 6 Mees. & Wels. 499; Rapson *v.* Cubitt, 9 Mees. & Wels. 710; Stone *v.* Cartwright, 6 T. R. 411; Milligan *v.* Wedge, 12 Adolph. & Ellis, 737; Winterbottom *v.* Wright, 10 Mees. & Wels. 109, 111; Ante, §§ 201, 217 *a*; Post, §§ 452, 453, 453 *a*, 453 *b*, 453 *c*, 454 *a*.

general maxim as to all such negligences and omissions of duty, is, in cases of private agency, *respondeat superior*.[1] Whether the agent

gence on the part of its officers, Parker, C. J., in Foster *v.* Essex Bank, 17 Mass. 479; Giblin *v.* McMullen, L. R. 2 P. C. 317; Scott *v.* Nat. Bank, 72 Pa. St. 471: but they are responsible for frauds or mistakes of the cashier or clerk in making entries on the books of the bank, and in false accounts of deposits, Salem Bank *v.* Gloucester Bank, 17 Mass. 1; Andrews *v.* Suffolk Bank, 12 Gray, 461.

Gas Companies, from the nature of their business, and the explosive and dangerous qualities of illuminating gas, are bound through their agents and servants to use unusual care and diligence. They must "institute and maintain an efficient system of oversight and superintendence, and be prepared with a sufficient force, ready to be put in action, and fully competent to supply and furnish a prompt remedy for all such accidents, defects, and interruptions in the conduct of their affairs as there was any reasonable ground to anticipate might occur." Merrick, J., in Holly *v.* Boston Gas Co., 8 Gray, 123. They are not responsible, however, for damages caused by the escape of gas, without proof of negligence in its management. Hutchinson *v.* Boston Gas Co., 122 Mass. 219; Emerson *v.* Lowell Gas Co., 3 Allen, 410; Bartlett *v.* Boston Gas Co., 122 Mass. 209; Simonton *v.* Loring, 68 Me. 165; Blenkiron *v.* Great Central Gas Cons. Co., 2 Fost. & F. 437; Flint *v.* Gloucester Gas Co., 3 Allen, 343; Holden *v.* Liverpool New Gas & Coke Co., 3 C. B. 1. They are liable for damages caused by their neglect to maintain such a reasonable inspection of their pipes as would enable them to detect leaks therein, Mose *v.* St. Leonard's Gas Co., 4 F. & F. 324; Hunt *v.* Lowell Gas Co., 1 Allen, 343: and for negligence in procuring proper gas-pipes, and in laying them in the streets, Dillon *v.* Washington Gas Co., 1 McArthur, 626; Brown *v.* N. Y. Gas Co., Anthon, N. P. Cas. 351; Schermerhorn *v.* Metrop. Gas Co., 5 Daly, 144; Devine *v.* Tarrytown, &c. Gas Co., 29 N. Y. Supreme, 26: and for negligence on the part of their agents in carrying a light, where there had been an escape of gas, Lannen *v.* Albany Gas Co., 44 N. Y. 459. But if the plaintiff goes himself with a lighted candle, or sends his servant with a light, to a room into which there had been an escape of gas, it has been held that such action would be contributory negligence on his part, and would prevent his recovery of damages from the gas company. Lanigan *v.* N. Y. Gas Co., 71 N. Y. 29; Bartlett *v.* Boston Gas Co., 122 Mass. 209; Vallée *v.* New City Gas Co., 7 Am. L. Rev. 767. Gas companies are also liable for negligence in drilling, in an unskilful manner, holes in their main pipes for the insertion of service pipes, Cleveland *v.* Spier, 16 C. B. N. S. 399: and for failing to close a service pipe when removing the meter and discontinuing the supply of gas, whereby an escape of gas occurs, Flint *v.* Gloucester Gas Co., 9 Allen, 552; Lanigan *v.* N. Y. Gas Co., 71 N. Y. 29; Parry *v.* Smith, L. R. 4 C. P. D. 325: and for negligence in not preventing careless interference with their pipes by other parties, Butcher *v.* Providence Gas Co., 12 R. I. 149; Burrows *v.* March Gas & Coke Co., L. R. 5 Ex. 67; Chisholm *v.* Atlanta Gas Co., 57 Ga. 28. — Ed.]

[1] Lord Holt, in his celebrated judgment in Lane *v.* Cotton, 12 Mod. 488, expounded this doctrine at large. "It was objected at the bar," said he, "that they have this remedy against Breese. I agree, if they could prove that he took out the bills, they might sue him for it; so they might anybody else, on whom

has been guilty of negligence or not, is not ordinarily a question of law, but of fact, under all the circumstances.[1]

§ 309. The distinction, thus propounded, between misfeasance and nonfeasance, — between acts of direct, positive wrong and mere neglects by agents as to their personal liability therefor, may seem nice and artificial, and partakes, perhaps, not a little of the subtilty and over-refinement of the old doctrines of the common law. It seems, however, to be founded upon this ground, that no authority whatsoever from a superior can furnish to any party a just defence for his own positive torts or trespasses; for no man can authorize another to do a positive wrong.[2] But, in respect to nonfeasances or mere neglects in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other; and no man is bound to answer for any such violations of duty or obligation, except to those to whom he has become directly bound or amenable for his conduct. Whether the distinction be satisfactory or not, it is well established, although some niceties and difficulties occasionally occur in its practical application to particular cases.

§ 310. It may be useful to illustrate each of these propositions by some cases which have been treated as clear, or which have undergone judicial decision. And, in the first place, as to the non-

they could fix that fact. But, for a neglect in him, they can have no remedy against him; for they must consider him only as a servant; and then his neglect is only chargeable on his master or principal; for a servant or deputy, *quatenus* such, cannot be charged for neglect, but the principal only shall be charged for it. But, for a misfeasance, an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrong-doer. As, if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner by neglect, to escape, the sheriff shall be charged for it, and not the bailiff. But, if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself; for then he is a kind of wrong-doer, or rescuer; and it will lie against any other that will rescue in like manner. And for this diversity, *vide* 1 Leon. 146; 3 Cro. 143, 175; 41 Ed. 3, 12; 1 Ro. 78; which is not well reported, but the inference may be well made from it." s. c. 1 Ld. Raym. 646, 653. See also Morse *v.* Slue, 1 Vent. 238, 239; Hall *v.* Smith, 2 Bing. 267; Bradford *v.* Eastburn, 2 Wash. Cir. 219; Ante, §§ 201, 217 *a*; Post, §§ 452-461; [Denny *v.* Manhattan Company, 2 Denio, 115].

[1] Foot *v.* Wiswall, 14 John. 304; Savage *v.* Birckhead, 20 Pick. 167.

[2] 3 Chitty on Com. & Manuf. 214; Perkins *v.* Smith, 1 Wilson, 328; s. c. Sayer, 41; Stephens *v.* Elwall, 4 Maule & Selw. 259; Farebrother *v.* Ansley, 1 Camp. 343; Morse *v.* Slue, 1 Vent. 238: [Nussbaum *v.* Heilbron, 68 Ga. 312; Knight *v.* Luce, 116 Mass. 586].

liability of agents for their nonfeasances and omissions of duty, except to their own principals. Thus, if the servant of a common carrier negligently loses a parcel of goods, intrusted to him, the principal, and not the servant, is responsible to the bailor or the owner.[1] So, if an under-sheriff is guilty of a negligent breach of duty, an action lies by the injured party against the high sheriff, and not against the deputy personally, for his negligence.[2] So, if the servant of a blacksmith so negligently conducts himself in shoeing a horse, that the horse is consequentially injured, or afterwards becomes lame, the master, and not the servant, will be liable for the negligent injury.[3] But, if the servant, in shoeing the horse, has pricked him, or has maliciously or wantonly lamed him, an action will lie personally against the servant himself.[4] So, the mere omission of a servant to deliver goods intrusted to him by his master, when demanded by the real owner, will not amount to a conversion of the goods, if, at the time, the servant states his want of authority to deliver them, and he has no knowledge of the true ownership.[5] So, it has been said, if an agent is guilty of any deceit or fraud or false warranty, in the business or employment of his principal, as, if he knowingly sells or warrants corrupt wines, or other things fraudulently disguised, for and by the authority of his principal, he is not personally responsible therefor to the buyer; but his master alone is liable.[6] But it may well be doubted whether an agent can shelter himself from personal responsibility, where he thus directly and knowingly cooperates in a deceit or misrepresentation or fraud, to the injury of

[1] 3 Chitty on Com. & Manuf. 214; Lane *v.* Cotton, 12 Mod. 488.

[2] Cameron *v.* Reynolds, Cowp. 403. See Morse *v.* Slue, 1 Vent. 238.

[3] 1 Black. Comm. 431; Story on Bailm. §§ 400, 402; Post, § 453. In 2 Black. Comm. 431, it is laid down: "If a smith's servant lames a horse, while shoeing him, an action lies against the master, and not against the servant." The law, as thus laid down, has been doubted by some commentators. See Mr. (now Mr. Justice) Coleridge's edition of 2 Blackstone's Comm. 431, note. The doubt seems to be founded upon this: whether it is not an act of misfeasance, and not merely negligence. See 1 Chitty's Black. Comm. 431, note. The question, after all, may turn mainly upon this, whether the injury be direct or consequential only. [See also Hay *v.* Cohoes Co., 3 Barbour, Sup. Ct. (N. Y.) 43.]

[4] Story on Bailm. §§ 402, 409.

[5] Alexander *v.* Southey, 5 B. & Ald. 247; Mires *v.* Solebay, 2 Mod. 242.

[6] Roll. Abridg. *Action on the Case*, 95 T. l. 20; 1 Com. Dig. *Action on the Case for Deceit*, B.; 3 Chitty on Com. & Manuf. 214. See Southerne *v.* How, Cro. Jac. 468; 2 Molloy, Jur. Marit. B. 3, ch. 8, § 6; s. c. Bridgman, 126, 127; Hern *v.* Nichols, Salk. 289; Grammar *v.* Nixon, 1 Str. 653.

a third person, although he is authorized to do so by his principal; for it is an illegal act, and contrary to sound morals.[1]

§ 311. In the next place, as to the liability of agents to third persons for their own misfeasances and positive wrongs. In all such cases (as we have seen), the agent is personally responsible, whether he did the wrong intentionally or ignorantly, by the authority of his principal; for the principal could not confer on him any authority to commit a tort upon the rights or the property of another.[2] Thus, if goods are delivered by the owner to A. to keep; if he delivers them to B. to keep to the use of A., and B. wastes or destroys them, the owner may have an action for the tort against B., although the bailment was not made to him by the owner; for B. is a wrong-doer.[3] So, if A. delivers his horse to a blacksmith, and he delivers him to another blacksmith, who wantonly lames him, A. may have an action against the latter; notwithstanding A. did not authorize the bailment, for he is a wrong-doer.[4]

§ 312. *A fortiori*, if the principal is a wrong-doer, the agent, however innocent in intention, who participates in his acts, is a wrong-doer also. Thus, if an auctioneer should be employed by a sheriff to sell goods at auction, which he had unlawfully seized upon an execution, as if the goods did not belong to the execution debtor, the auctioneer who should sell, would be liable to an action

[1] 19 Hen. 6, 53; Com. Dig. *Action on the Case for Deceit*, B.; Story on Equity Leadings, § 282; 1 Story on Equity Jurisp. §§ 191, 192, 204; Ante, § 308.

[2] Ante, § 308; Lane *v.* Cotton, 12 Mod. 488; Perkins *v.* Smith, 1 Wils. 328; s. c. Sayer, 40, 42; Bush *v.* Steinman, 1 Bos. & Pull. 404, 410. [Although an agent is only liable to his principal for omissions of duty, he is personally responsible to third parties for acts of misfeasance, whether he did the wrong intentionally or ignorantly, or by the authority of his principal; for the latter cannot confer upon him any right to commit a wrong against a third party. Thus, where an agent to transfer stock to A. transferred it to himself and B., he was held responsible to A. Crane *v.* Onderdonk, 67 Barb. 47; Richardson *v.* Kimball, 28 Me. 464. So, where a railroad agent, under orders from his superintendent, refused to deliver goods to a consignee, who had left the Confederate States and gone into Federal lines, he was held personally liable, as he chose to obey an illegal order. Elmore *v.* Brooks, 6 Heisk. 45. And where an agent of a party received permission to pass through another's land to haul wood for his principal, and was directed to close the gap in the fence as often as he passed, and neglected to do so, whereby the cattle of the owner of the land escaped, and were killed on the railroad, it was held that he was personally liable, as it was a wilful violation of his orders. Horner *v.* Lawrence, 37 N. J. L. 46. — Ed.]

[3] 1 Roll. Abridg. *Action sur Case*, 90 O. 1, l. 15; 3 Chitty on Com. & Manuf. 214.

[4] 1 Roll. Abridg. *Action sur Case*, p. 90, O. 2, l. 20; Ante, § 310.

for the tortious conversion, equally with the sheriff.[1] So, if the agent of a merchant who has received goods from a bankrupt after a secret act of bankruptcy, should, pursuant to orders from his principal, sell the goods, an action of trover would lie in favor of the assignees against the agent, however ignorant he might be of the defect of title; for a person is guilty of a conversion who intermeddles with the property of another, without due authority from the true owner; and it is no answer that he acted as an agent, under the authority of a person supposed at the time to be entitled as the owner.[2]

§ 313. But no action will ordinarily lie against an agent for the misfeasance, or for the negligence of those whom he has retained for the service of his principal, by his consent or authority, any more than it will lie against a servant who hires laborers for his master at his request, for their acts; unless, indeed, in either case, the particular acts which occasion the damage are done by the orders or directions of such agent or servant.[3] The action, under other circumstances, must be brought either against the principal or against the immediate actors in the wrong.[4]

[1] Farebrother *v.* Ansley, 1 Camp. 343; Adamson *v.* Jarvis, 4 Bing. 66; Post, § 339. See Van Brunt *v.* Schenk, 11 John. 377. In this latter case, there had been a seizure of a ship by a revenue officer, for a supposed breach of law, and pending the proceedings under the seizure, he allowed another officer to take possession of and use the ship. Afterwards, upon the trial, the ship was acquitted; but the court granted a certificate of probable cause of seizure. The owner of the ship brought an action of trespass against the officer who had used the ship, and the court held that trespass did not lie. The court seem to have thought, that the seizure, being made for a supposed breach of law, divested the possession of the owner. The same decision was made in Barrett *v.* Warren, 3 Hill, 348. But Mr. Justice Cowen doubted the correctness of the doctrine, in a very elaborate opinion. *Quære*, whether the possession of the owner would be divested by the illegal seizure of the sheriff so as to take away the right to maintain trespass against a subsequent holder under the sheriff. There is no doubt, that trover would lie in such a case. But trespass would lie against a *mala fide* purchaser, and against a second trespasser, who takes by trespass from the first. Ibid.; Acker *v.* Camp, 23 Wend. 372; Wilbraham *v.* Snow, 1 Siderf. 438.

[2] Stevens *v.* Elwall, 4 M. & Selw. 259; [Sharland *v.* Mildon, 5 Hare, 469;] Paley on Agency, by Lloyd, 399, 400; Perkins *v.* Smith, Sayer, 40, 42; s. c. 1 Wilson, 328; McCombie *v.* Davies, 6 East, 538; Baldwin *v.* Cole, 6 Mod. 212; [Kimball *v.* Billings, 55 Me. 147; Spraights *v.* Hawley, 39 N. Y. 441; Fowler *v.* Hollins, L. R. 7 Q. B. 616].

[3] Stone *v.* Cartwright, 6 T. R. 411; 3 Chitty on Com. & Manuf. 214. See Hills *v.* Ross, 3 Dall. 331; Nicholson *v.* Mounsey, 15 East, 383, 387, 388. See Ante, §§ 201, 217 *a*, 313; Post, §§ 321, 322.

[4] Stone *v.* Cartwright, 6 T. R. 411; Bush *v.* Steinman, 1 Bos. & Pull. 404;

§ 314. There is, however, one important exception to the rule already stated as to the non-liability of agents to third persons for the negligences and omissions of duty of themselves and of their sub-agents, founded upon the principles of the maritime law. It is the case of masters of ships, who, although they are the agents or servants of the owners, are also, in many respects, deemed to be responsible, as principals, to third persons, not only for their own negligences and nonfeasances, but also for the negligences, nonfeasances, and misfeasances of the subordinate officers and others employed by and under them.[1] We have already seen, that the master of the ship is responsible upon contracts made by him in regard to the usual employment of the ship, and also upon contracts made by him for the repairs and necessaries supplied for the ship, as well as for the wages of the seamen employed in navigating the ship.[2] This liability is founded upon the doctrine of the maritime law, which treats the master, not merely as an agent contracting on his own behalf, as well as for the owner, but which, upon a broader policy, treats him as in some sort a subrogated principal and qualified owner of the ship, possessing authority in the nature of the exercitorial power for the time being.[3] And his liability, founded upon

Denison *v.* Seymour, 9 Wend. 8, 12; Rapson *v.* Cubitt, 9 Mees. & Wels. 710; Quarman *v.* Burnett, 6 Mees. & Wels. 710; Post, §§ 454, 454 *a*. [Thus, the liability of an intermediate common carrier for the safety of goods delivered to him is discharged by their delivery to, and acceptance by, a succeeding carrier, Pratt *v.* Railway Co., 95 U. S. 43: but a common carrier who undertakes to perform an entire service, as, for instance, to transport goods from one point to another, is liable for the negligence of an intermediate carrier employed by him to perform a portion of the service, Bank of Ky. *v.* Adams Ex. Co., 93 U. S. 174: but where an agent sends goods of his principal to a factor for sale, and a loss occurs through the negligence of the factor, the agent will not be liable if he has faithfully carried out the instructions given to him by his principal, Whitlock *v.* Hicks, 75 Ill. 460. But see Pownall *v.* Bair, 78 Pa. St. 403; Brown *v.* Lent, 20 Vt. 532; Reedie *v.* London, &c. Railway Co., 4 Ex. 255. — ED.]

[1] Post, §§ 316, 317.

[2] Ante, §§ 36, 116, 117, 294–300.

[3] Ante, §§ 36, 116, 117, 294, 295. Lord Hale, in Morse *v.* Slue, 1 Vent. 238; s. c. 1 Mod. 85 (which was an action on the case against the master of a ship, for negligence in the carriage of goods, whereby they were stolen), in allusion to this point, said: "It is objected, that the master is but a servant to the owners. Answer. The law takes notice of him as more than a servant. It is known, that he may impawn the ship, if occasion be, and sell *bona peritura*. He is rather an officer than a servant." He added: "By the civil law, the master or owner is chargeable, at the election of the merchant." See also Molloy, B. 2, ch. 2, § 2. See also Dig. Lib. 5, tit. 9, l. 1, § 2. See Post, § 317, note, and Ante, §§ 36, 116.

this consideration, extends not merely to his contracts, but (as we have said) to his own negligences and nonfeasances and misfeasances, as well as to those of his officers and crew.[1] His responsibility for the officers and crew has this additional reason for its support, that he is thus induced to exercise a superior watchfulness over their acts and conduct; and, if he were not so made liable for their acts and conduct, he might often, by his connivance in their frauds, misfeasances, negligences, or nonfeasances subject the shippers of goods, as well as the owners of the ship, to great losses and injuries, without their having any adequate redress.[2] The policy of the maritime law has therefore indissolubly connected his personal responsibility with that of all the other persons on board, who are under his command, and are subjected to his authority.

§ 315. Hence it is that the master of a general or carrier ship, as well as the owner, is treated as a common carrier. He is responsible for the goods in the like manner as any other common carrier; and nothing will discharge him from his responsibility to the owners of the goods, but a loss by some act of Providence or by some inevitable casualty or by some public enemy.[3] If the goods, therefore, are injured or perish by the negligence or misfeasance of the crew, or if they are stolen, the master, as well as the owner, is severally liable therefor.[4]

[1] Abbott on Shipp. Pt. 2, ch. 2, § 2; Id. Pt. 3, ch. 3, § 3; Id. Pt. 2, ch. 4, § 1, and notes (Amer. ed. 1829); Purviance *v.* Argus, 1 Dall. 184, 185; 2 Valin, Lib. 2, tit. 7, art. 4, p. 171; Denison *v.* Seymour, 9 Wend. 1, 8, 15; Schieffelin *v.* Harvey, 6 John. 170; Ante, §§ 294, 295, 308; Post, § 317, note.

[2] Abbott on Shipp. Pt. 3, ch. 3, § 3 (Amer. ed. 1829); Ante, §§ 116, 117, 293–306. [And see Nugent *v.* Smith, L. R. 1 C. P. D. 19, 423; White *v.* McDonough, 3 Sawyer, 311. But where the defendants contracted to receive the plaintiff's ship into dock at a specified time, and she was brought on a stormy day under charge of the captain and a pilot, and was anchored because one of the dock gate chains was broken, and could not be got into the dock, and when the tide turned was grounded and greatly injured, it was held that neither the captain nor the pilot were guilty of negligence. Wilson *v.* Newport Dock Co., L. R. 1 Ex. 177. The owners of a tug, however, are not liable as common carriers, but are bound to exercise such care, skill, and diligence as the nature of the case requires. Transportation Line *v.* Hope, 95 U. S. 297; Sproul *v.* Hemmingway, 14 Pick. 1. — Ed.]

[3] Morse *v.* Slue, 1 Vent. 238; Molloy, B. 2, ch. 2, § 2.

[4] Abbott on Shipp. Pt. 3, ch. 3, § 3, ch. 4, § 1 (Amer. ed. 1829); Morse *v.* Slue, 1 Vent. 238; Molloy, B. 2, ch. 2, § 2, Schieffelin *v.* Harvey, 6 John. 170, 176; Watkinson *v.* Laughton, 8 John. 213, 216. In Abbott on Shipp. Pt. 3, ch. 3, § 3, p. 222 (Amer. ed. 1829), it is said: "As soon as any goods are put on board, the master must provide a sufficient number of persons to protect them; for, even if the crew be overpowered by a superior force, and the

§ 316. Upon the same ground, the master of a steamboat employed in the transportation of passengers, is, like the master of a vessel engaged in the merchant service, held liable for the misfeasance and negligence and want of care of all the persons, officers, and crew to whom the management of the steamboat is intrusted. And this rule is applied without any distinction, whether the officers and crew are appointed by the owners or by himself.[1] Therefore, where, by the negligence of the pilot of a steamboat, who was appointed by the owner, a collision took place, whereby another vessel was run down and sunk while the pilot was at the helm navigating the boat, he having the exclusive control and direction of her course, it was held that the master of the boat was responsible in damages for the injury by the collision.[2]

goods stolen, while the ship is in a port or river within the body of a county, the master and owners will be answerable for the loss, although they have been guilty of neither fraud nor fault; the law, in this instance, holding them responsible, from reasons of public policy, and to prevent the combinations that might otherwise be made with thieves and robbers."

[1] Foot *v.* Wiswall, 14 John. 304; Denison *v.* Seymour, 9 Wend. 8.

[2] Denison *v.* Seymour, 9 Wend. 8, 15. Mr. Chief Justice Savage, in delivering the opinion of the court, went into an elaborate examination of the authorities, and then added: "Were this an action against the master of a vessel engaged in the merchant service, it seems to be conceded by all the cases that he would be liable. In such cases, the master is responsible for the diligence of all to whom is intrusted the management of the vessel. On the other hand, were the action against the captain of a ship-of-war, the case of Nicholson *v.* Mounsey proves that the captain is not responsible for the negligence of the other officers. For this exemption, two reasons seem to be assigned; one is, that the captain and his officers are all appointed by the same authority, and the captain cannot appoint or remove his inferior officers; the other reason is, that the captain is not a volunteer in the station where he is found. He is obliged, from the office which he holds, to take command of any vessel to which he may be assigned, with such other officers and crews as he may find there, and make the best of them. A steamboat, for the transportation of passengers with their baggage, and for carrying small freight, is a merchant vessel; and, though the pilots are appointed by the owners, and not by the captain, yet the captain is a volunteer in that service, in the language of Lord Ellenborough. The steamboat service is not like the naval service of a nation. No captain is bound to engage as such; he has a choice, whether he will serve with such persons as the owners choose to put on board as officers. He knows the responsibility of master of a vessel, and if he is unwilling to be responsible for the negligence of the subordinate officers, he is under no compulsion to serve there himself. If he accepts the office of master of the vessel, he does so with the knowledge of the responsibility which, as such, he incurs. If the owner of a merchant ship were to stipulate with the master that he should take certain persons for his mates, that, I apprehend, would not alter his responsibility to third persons, however it might affect his responsibility to the owner. On the whole, I am of opinion, that the fact of the pilot being chosen by the owners does not alter

§ 317. The same rule is adopted in the maritime jurisprudence of the modern commercial nations of continental Europe, it having been derived from the same common source,— the Roman law.[1] By this law, the prætor gave a remedy against the master and employers of ships, where they had received goods as carriers, and had not safely delivered them. "Ait prætor (says the Digest), nautæ, caupones, stabularii, quod cujusque salvum fore reciperint, nisi restituent, in eos judicium dabo."[2] The reason assigned in the Digest, is

the law as to the captain's responsibility. Suppose the owners should contract, not only with the pilots, but with all the hands on board, through the agency of some other person besides the captain, as they probably do, would the captain, therefore, become entirely irresponsible? And must any one whose vessel has been run down where a totally irresponsible person was at the wheel, bring his suit against a common sailor? The owners of a vessel may not be known; they may be residents of a foreign country. It would be adding insult to injury, to say to a man, whose property had been destroyed, that he has his remedy against a common sailor, or the owners, who, perhaps, live in Europe. My opinion is, that the master of a steamboat is liable like the master of a merchant ship; and that the circumstance of the pilot's being appointed by the owners does not discharge that liability, so far as third persons are concerned." See also Nicholson *v.* Mounsey, 15 East, 384. See Abbott on Shipp. Pt. 2, ch. 7, §§ 1-9, p. 173 (Shee's ed. 1840), and Lacey *v.* Ingram (1840), Exch. cited in the Addenda to the same edition. [The owner and master of a steam vessel are responsible for injuries caused by the negligence of its pilot and engineer, nor are they relieved by the fact that their selection of a pilot is limited to those who have been found by examination to possess the requisite knowledge and skill, and have been licensed. Sherlock *v.* Alling, 93 U. S. 99. And the pilot while in charge of the ship is held to be the agent of the owner. Yates *v.* Brown, 8 Pick. 23. — Ed.]

[1] Rocc. de Nav. n. 3, 19, 55, 57, 59, 62, 68; 2 Emerig. ch. 4, § 10, p. 448, &c.; 2 Valin, Comm. Liv. 3, tit. 7, art. 4, p. 161; Pothier, *Charte partie*, n. 45; Post, § 458; 1 Stair's Instit. by Brodie, B. 1, tit. 12, § 28; 1 Bell, Comm. § 500, p. 456 (4th ed.); Id. §§ 501, 502, pp. 469-471; Id. § 505, pp. 473, 474; Id. pp. 465-476 (5th ed.).

[2] Dig. Lib. 4, tit. 9, Introd.; Pothier, Pand. Lib. 4, tit. 9, n. 1, 2. The Digest has explained who are meant by *nautæ*, in this place. The word embraces, in its most extensive signification, all those who are employed in the navigation of the ship. But it is here used in a more restrictive sense, as including properly the employer of the ship, commonly called the *exercitor*, an appellation which sometimes is applied to the master, although it is generally used in contradistinction to him. Thus, Ulpian says: "Ait Prætor; nautæ; nautâm accipere debemus eum, qui navem exercet; quamvis nautæ appellantur omnes, qui navis navigandæ causâ in nave sint. Sed de exercitore solummodo prætor sentit. Nec enim debet (inquit Pomponieus), per remigem, aut meso-nautam obligari; sed per se, vel per navis magistrum; quanquam si ipse alicui e nautis committi jussit, sine dubio debeat obligari." Dig. Lib. 4, tit. 9, l. 1, § 2; Pothier, Pand. Lib. 4, tit. 9, n. 2. See also Dig. Lib. 47, tit. 5, l. 1; Pothier, Pand. Lib. 47, tit. 5, n. 1, 2, 3, 8, 10; Dig. Lib. 14, tit. 1, l. 1, § 2. See 2 Emerigon, ch. 4, § 10, p. 448, &c.; Post, § 458.

precisely that which governs in the policy of modern maritime nations; that is to say, the necessity of placing confidence in the masters and crews of ships, and the impossibility of shippers of goods being otherwise secure against the injuries sustained by them from the negligences, misfeasances, and frauds of the masters and crews. "Maxima utilitas est hujus edicti; quia necesse est plerumque eorum fidem sequi, et res custodiæ eorum committere. Ne quisquam putet graviter hoc adversus eos, constitutum; nam est in ipsorum arbitrio, ne quem, recipiant. Et nisi hoc esset statutum, materia daretur cum furibus adversus eos, quos recipiunt, coeundi; cum ne nunc quidem abstineant hujusmodi fraudibus."[1]

§ 318. The master of a ship, however, is not, any more than the owner thereof, responsible for wilful trespasses and injuries, done by the persons employed under him, which acts were not ordered by him, or were not in the course of the duty devolved upon such persons.[2] In all such cases, the proper remedy is against the immediate wrong-doers, for their own misconduct.[3]

§ 319. In the next place, as to the liability of public agents for torts or wrongs done in the course of their agency. It is plain, that the government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests; and, indeed, laches are never imputable to the government.[4] Our next inquiry,

[1] Dig. Lib. 4, tit. 9, l. 1, § 1; Pothier, Pand. Lib. 4, tit. 9, n. 1.

[2] Bowcher *v.* Noidstrom, 1 Taunt. 568.

[3] [And where the plaintiff's boat was run into and injured by the wilful act of the master of defendants' steamboat, the defendants were held not to be liable, although the act was sanctioned by the president and general agent of the defendant corporation. Vanderbilt *v.* Richmond Turnpike Co., 2 Comst. 479; Hipp *v.* The State, 5 Blackf. 149; Eastern Counties R. Co. *v.* Broom, 6 Exch. 314. But railroad companies have been held liable to parties injured by acts of their servants if within the general scope of their employment, whether the act was wilful or only negligent. Ramsden *v.* Boston & Al. R. R. Co., 104 Mass. 117; Coleman *v.* N. Y. & N. H. R. R. Co., 106 Mass. 160; Moore *v.* Fitchburg R. R. Co., 4 Gray, 465. And the owners of a steamboat have been held liable for damages suffered from an assault and battery upon a passenger committed by the steward and table-waiters without excuse. Bryant *v.* Rich, 106 Mass. 180. — Ed.]

[4] See Seymour *v.* Van Slyck, 8 Wend. 403, 422; United States *v.* Kirkpatrick, 9 Wheat. 720, 728.

therefore, is, whether the heads of its departments, or other superior functionaries, are in a different predicament. And here the doctrine is now firmly established (subject to the qualifications hereinafter stated), that public officers and agents are not responsible for the misfeasances, or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty of the sub-agents, or servants or other persons properly employed by and under them, in the discharge of their official duties. Thus, for example, it is now well settled, although it was formerly a matter of learned controversy, that the postmaster-general is not liable for any default, or negligence, or misfeasance of any of the deputies or clerks employed under him in his office.[1] This exemption is founded upon the general ground, that

[1] Lane *v.* Cotton, 1 Ld. Raym. 646; s. c. 12 Mod. 482; Whitfield *v.* Le Despencer, Cowp. 754; 1 Bell, Comm. § 401, p. 377 (4th ed.); Id. p. 468 (5th ed.); 3 Chitty on Com. & Manuf. 214; Post, §§ 321, 322. Lord Holt differed from this opinion in Lane *v.* Cotton; but the doctrine of the other judges was afterwards affirmed in Whitfield *v.* Le Despencer, Cowp. 754. The principles involved in the discussion are thus shortly stated in Story on Bailm. § 462: "In the year 1699 an action was brought against the postmaster-general for the loss of a letter containing exchequer bills, by the negligence of his servants and deputies; and three judges against Lord Holt held, that the plaintiff was not entitled to recover. The ground of the opinion of the three judges appears to have been, that the post-office establishment is a branch of the public police, created by statute for purposes of revenue, as well as for public convenience, and that the government have the management and control of the whole concern. It is, in short, a government instrument, established for its own great purposes. The postmasters enter into no contract with individuals, and receive no hire, like common carriers, in proportion to the risk and value of the letters under their charge, but only a general compensation from government. The same question was again still more elaborately discussed in a case in the time of Lord Mansfield, brought against the postmaster-general to recover the amount of a bank-note stolen out of a letter by one of the sorters of letters, when the court adhered to the doctrine of the three judges against the opinion of Lord Holt. Upon that occasion Lord Mansfield said: "The ground of Lord Holt's opinion in that case is founded upon comparing the situation of a postmaster to that of a common carrier, or the master of a ship taking goods on board for freight. Now, with all deference to so great an opinion, the comparison between a postmaster and a carrier, or a master of a ship, seems to me to hold in no particular whatever. The postmaster has no hire, enters into no contract, carries on no merchandise or commerce. But the post-office is a branch of revenue, and a branch of police, created by act of parliament. As a branch of revenue there are great receipts; but there is likewise a great surplus of benefit and advantage to the public, arising from the fund. As a branch of police, it puts the whole correspondence of the country (for the exceptions are very trifling) under government, and intrusts the management and direction of it to the crown, and the officers appointed by the crown. There is no analogy, therefore, between the case of the postmaster and a common carrier." In truth, in England and in America, the postmasters are

he is a public officer, and that the whole establishment of the post-office being for public purposes, and the officers employed therein being appointed under public authority, it would be against public policy to make the head of the department personally responsible for the acts of all his subordinate officers; since it would be impracticable for him to supervise all their acts; and discouragements would thus be held out against such official employment in the public service.[1]

§ 319 *a*. Similar considerations apply to deputy postmasters, and other subordinate officers acting under the head of a department, who are compelled, in the course of their official duties, to employ sub-agents, and clerks, and servants, in the public service.[2] They are not responsible, either to the government itself, or to third persons, for the misfeasances, or negligences, or omissions of duty of the sub-agents, clerks, and servants so employed under them, unless, indeed, they are guilty of ordinary negligence at least, in not selecting persons of suitable skill, or in not exercising a reasonable superintendence and vigilance over their acts and doings.[3] In this respect their responsibility does not seem to differ from that of private agents, who employ sub-agents at the request of their principals.[4] Indeed, for many purposes, the deputy postmasters are treated as principals, and substantially as independent officers of the government.[5]

mere public officers, appointed by the government; and the contracts, made by them officially, are public, and not private contracts; binding on the government, and not on themselves personally. Ante, §§ 302–305; Dunlop *v.* Munroe, 7 Cranch, 242, 269; Post, §§ 321, 322; [Keenan *v.* Southworth, 110 Mass. 474].

[1] Ibid. See Seymour *v.* Van Slyck, 8 Wend. 403, 422; United States *v.* Kirkpatrick, 9 Wheat. 720, 725; Post, §§ 320–322.

[2] Rowning *v.* Goodchild, 3 Wilson, 443; Stock *v.* Harris, 5 Burr. 2709; McMillan *v.* Eastman, 4 Mass. 378; Story on Bailm. § 463; 4 Bell, Comm. § 401, p. 377 (4th ed.); Id. p. 468 (5th ed.); Whitfield *v.* Le Despencer, Cowp. 754, 765.

[3] Dunlop *v.* Munroe, 7 Cranch, 242, 269. In this case, the very point was not positively decided, but the court intimated an opinion to this effect; and it seems a just inference from the principles applicable to the subject. See Story on Bailm. § 463; 2 Kent, Comm. Lect. 40, pp. 610, 611 (4th ed.).

[4] Ante, § 313; [Schroyer *v.* Lynch, 8 Watts. 453; Wiggins *v.* Hathaway, 6 Barb. 632; Hutchins *v.* Brackett, 2 Foster, 252; Conwell *v.* Voorhees, 13 Ohio, 523. But a mail-carrier not sworn in conformity to law was held not to be an officer of government, but the servant of a contractor appointing him, and the latter was responsible for his defaults. Sawyer *v.* Corse, 17 Gratt. 230; Bishop *v.* Williamson, 11 Me. 495; Bolan *v.* Williamson, 1 Brev. 181. — Ed.]

[5] Ante, § 319, note.

§ 319 *b*. But although neither the government nor its superior officers, are responsible to third persons for misfeasances, or negligences, or omissions of duty of the subordinates in office, properly or necessarily employed under them, it by no means follows that such subordinates are themselves exempted from all personal responsibility therefor to third persons. On the contrary, the very consideration, that the public superiors are not responsible for the acts and omissions of their subordinates in their official conduct, distinguishes the case from that of mere private agencies, and lets in the doctrine, that, under such circumstances, they shall be held personally responsible therefor to third persons who are injured thereby. Thus, for example, deputy postmasters are held responsible to third persons, for any injuries or losses sustained by the latter, from the personal negligence or omissions of duty of such deputy postmasters.[1]

§ 320. *A fortiori*, the same rule applies to cases where the subordinate officers of the government are guilty of direct misfeasances or positive wrongs to third persons in the discharge of their official functions; for, in such cases, they incur the same personal responsibility, and to the same extent, as private agents.[2] This is founded upon a very plain principle of common sense and common justice; and that is, that no person shall shelter himself from personal liability, who does a wrong, under color of, but without any authority,

[1] Rowning *v.* Goodchild, 3 Wilson, 443; s. c. 5 Burr. 2715, 2716; 2 W. Black. 906; 3 Chitty on Com. & Manuf. 214. In Whitfield *v.* Le Despencer, Cowper, 765, Lord Mansfield said: "As to an action on the case lying against the party really offending, there can be no doubt of it; for, whoever does an act, by which another person receives an injury, is liable, in an action, for the injury sustained. If the man who receives a penny to carry the letters to the post-office loses any of them, he is answerable; so is the sorter in the business of his department. So is the postmaster, for any fault of his own." [Maxwell *v.* McIlroy, 2 Bibb, 211; Ford *v.* Parker, 4 Ohio St. 556; Dox *v.* Postmaster Gen'l, 1 Pet. 318.]

[2] Ante, §§ 308, 311; Bayley *v.* Mayor of New York, 3 Hill, 531. [Thus, the tender of a public drawbridge, who was paid a salary, was held liable to a traveller who was injured by falling into the drawbridge which the tender had negligently left open. Nowell *v.* Wright, 3 Allen, 166. So, a surveyor of highways was held responsible for the negligent repair of a highway. Pendlebury *v.* Greenhalgh, L. R. 1 Q. B. D. 36; but see Taylor *v.* Greenhalgh, L. R. 9 Q. B. 487. So, where an overseer of highways left some planks out of a bridge so that a traveller fell into a canal and was injured, he was held liable for such negligence, Shepherd *v.* Lincoln, 17 Wend. 250: and highway commissioners who negligently cut a drain so that the water was diverted upon the land of an adjacent owner, were held to be personally responsible therefor, Tearney *v.* Smith, 86 Ill. 391; Pekin *v.* Brereton, 67 Ill. 477; McCord *v.* High, 24 Iowa, 336; Fitzgerald *v.* Burrill, 106 Mass. 446. — Ed.]

or by an excess of his authority, or by a negligent use or abuse of his authority. Where a person is clothed with authority, as a public agent, it cannot be presumed, that the government means to justify, or even to excuse, his violations of his own proper duty, under color of that authority. And, in cases of this sort, it is not sufficient for public agents to show, that they have acted *bona fide*, and to the best of their skill and judgment; for they are bound also to conduct themselves with reasonable skill and diligence in the execution of their trust.[1] Therefore, where commissioners, appointed to pave certain streets, under an act of parliament, grossly exceeded their powers, by raising the street in front of the plaintiff's house, so as to obstruct the passages to the house, as well as the lights thereof; it was held, that they were liable to an action on the case for damages.[2] But, if there has been no misfeasance or negligence, and no excess of authority, by public agents, in the execution of their duty, then they will not be liable, although a party may have sustained damages in consequence of their acts.[3]

§ 321. The rule, which we have been considering, that where persons are acting as public agents, they are responsible only for their own misfeasances and negligence, and (as we have seen[4]) not for the misfeasances and negligences of those who are employed under them, if they have employed persons of suitable skill and ability, and have not co-operated in or authorized the wrong, is not confined to public officers, or agents of the government, properly so called, in a strict legal sense; but it equally applies to other public officers or agents, engaged in the public service, or acting for public objects, whether their appointments emanate from particular public bodies, or are derived from general laws, and whether those objects are of a local or of a general nature. For, if the doctrine of *respondeat superior* were applied to such agencies, it would operate as a serious discouragement to persons who perform public functions, many of which are rendered gratuitously, and all of which are highly important to the public interest.[5] In this respect, their case is distinguishable

[1] Jones *v.* Bird, 5 B. & Ald. 837, 845.

[2] Leader *v.* Moxton, 3 Wils. 461; s. c. 2 W. Black. 924; Hall *v.* Smith, 2 Bing. 156. See also Governor and Company of Plate Manufacturers *v.* Meredith, 4 T. R. 794.

[3] Governor and Company of Plate Manufacturers *v.* Meredith, 4 T. R. 794. See Callender *v.* Marsh, 1 Pick. 418; [School District No. 6 *v.* Ætna Ins. Co. 62 Me. 330].

[4] Ante, § 319.

[5] Hall *v.* Smith, 2 Bing. 156; Harris *v.* Baker, 4 M. & Selw. 27; Bayley *v.*

from that of persons acting for their own benefit, or employing others for their own benefit.[1] But the party who suffers the injury under

The Mayor of New York, 3 Hill, 531; Ante, §§ 319, 319 *a*. The judgment of the court, in the case of Hall *v.* Smith, delivered by Lord Chief Justice Best, is very instructive, and states the ground of the distinction with great clearness and force. "If commissioners under an act of parliament," said he, "order something to be done which is not within the scope of their authority, or they are themselves guilty of negligence in doing that which they are empowered to do, they render themselves liable to an action; but they are not answerable for the misconduct of such as they are obliged to employ. If the doctrine of *respondeat superior* were applied to such commissioners, who would be hardy enough to undertake any of those various offices, by which much valuable yet unpaid service is rendered to the country? Our public roads are formed and kept in repair, our towns paved and lighted, our lands drained and protected from inundation, our internal navigation has been improved, ports have been made and are kept in order, and many other public works are conducted by commissioners, who act spontaneously. Such commissioners will act no longer, if they are to make amends, from their own fortunes, for the conduct of such as must be employed under them. It would be much better that an individual, injured by the act of an agent, should endure an injury unredressed, than that the zeal of the most useful members of the community should be checked, by subjecting them to a responsibility for agents, from whose services they derive no benefit, and who are seldom under the immediate control of their employers, whilst they are employed on the works they are ordered to do. The commissioners, taking the advice of their surveyors and engineers, are to direct what tunnels, or other works, are to be made. Few commissioners know how such works should be executed; they ought not, therefore, to be answerable for an imperfect execution of them; nor can it be expected that they shall attend, day by day, to see that proper precautions are taken against accidents, or to get up in the night to see that lights are burned, to warn passengers of the danger from temporary obstructions in the roads. If, by taking their office of commissioners, they have not undertaken the performance of these duties, with what justice can they be charged with the consequences of the neglect of them? The maxim of *respondeat superior* is bottomed on this principle, that he who expects to derive advantage from an act, which is done by another for him, must answer for any injury which a third person may sustain from it. This maxim was first applied to public officers by the statute of Westminster 2, c. 11, from the words of which statute it is taken. 'Si custos gaolæ non habeat, per quod justicietur, vel unde solvat, respondeat superior suus, qui custodiam hujusmodi gaolæ sibi commisit.' The terms of the statute of Westminster the second, embrace only those who delegate the keeping of jails to deputies, and were intended only, as Lord Coke tells us, to apply 'to those who, having the custody of jails of freehold or inheritance, commit the same to another, that is not sufficient.' The principle of the statute has, however, since been extended to sheriffs, who are responsible for their under-sheriffs and bailiffs; but has not been applied to any other public officer. Although the office of sheriffs be now a burdensome one, yet

[1] Hall *v.* Smith, 2 Bing. 156; Harris *v.* Baker, 4 M. & Selw. 27.

such circumstances, is not without redress; for he may maintain a suit against the immediate wrong-doer.[1] Upon this ground it has

they are entitled to poundage, and other fees, for acts done by their officers, which, in old time, might be a just equivalent for their responsibility. In Bowcher *v.* Noidstorm, Lawrence, J., mentions the case of the captain of the Russell man-of-war, who was held answerable for the act of one of the lieutenants, who had the command of the watch, in running down an Indiaman, whilst the captain was asleep in his cabin. When or by whom that case was decided, I do not know; but it is supported by no other decision, that I am aware of, and its authority is shaken by the judgment of the case in which it is cited. The actions in the cases of Leader *v.* Moxon, Jones *v.* Bird, and the Plate-Glass Company *v.* Meredith, were not brought against the commissioners, but against those who did the acts complained of. In the latter case I adverted to that circumstance, as distinguishing it from Sutton *v.* Clarke. If the counsel, who advised the bringing these actions, had thought they could have been maintained against the commissioners, who gave the orders for the works, that occasioned the injuries of the plaintiffs, the commissioners would have been included. Schinotti *v.* Bumsteed is distinguishable from this case. There, the negligence was brought home to the commissioners of the lottery, who were the defendants, and they were compensated for their services, and were bound to pay due attention to their duty. The commissioners here had authority to make the trench, which occasioned the damage to the plaintiff. The Plate-Glass Company *v.* Meredith, already referred to, shows that no action could be maintained against them for what they are authorized to do, although an individual sustain an injury from what has been done. The passage into the plaintiff's premises, in that case, was rendered impassable with carts, by the raising of pavement, by the order of the commissioners. Lord Kenyon says: 'If this action could be maintained, every turnpike act, paving act, and navigation act, would give rise to an infinity of actions. The parties are without remedy, provided the commissioners do not exceed their jurisdiction.' In Sutton *v.* Clarke, the defendant, as a trustee under a turnpike act, who was duly authorized to make a drain, had ordered such drain to be cut in an improper manner; he had, however, given this order after having taken the best advice that could be obtained. Lord Chief Justice Gibbs considered that circumstance as distinguishing the case from that of the British Plate-Glass Company, where what was done could not be done in any other manner than that in which it was done. But still his lordship and the rest of the court held, that as the defendant acted according to the best of his judgment, and with the best advice, he was not answerable for the injury; and he added, 'This case is perfectly unlike that of an individual who makes an improvement on his own land, from which an injury accrues to another; such person must answer for the injury, because he was acting for his own benefit.' In Harris and Cross *v.* Baker, the clerk to commissioners for making a road, under an act which contained a clause directing actions to be brought against such clerk for acts done by the trustees, was holden not to be liable to an action for an injury sustained, in consequence of heaps of dirt being left by the side of the

[1] Ibid.; Jones *v.* Bird, 5 B. & Ald. 837; Nicholson *v.* Mounsey, 15 East, 384; Ante, §§ 313, 319 *b*.

been held, that the trustees of a public turnpike are not liable for the misfeasances or negligences of sub-agents employed by them in the performance of their duty, unless they have directed the act to be done, or have personally co-operated in the negligence.[1]

road, and no lights being placed to enable persons to avoid such heaps. In this case there was, as in that now before us, great negligence in those employed by the trustees. From these cases I collect, that the law recognizes the principles, which, I venture to state, were founded in sound policy and justice, and that no action can be maintained against a man acting gratuitously for the public for the consequences of any act which he was authorized to do, and which, so far as he is concerned, is done with due care and attention, and that such a person is not answerable for the negligent execution of an order properly given." Ante, §§ 319, 319 *a*.

[1] Duncan *v.* Findlater, 6 Clarke & Fin. 903, 910. In this case, the question came from Scotland, and it was held by the House of Lords, that the English law and Scottish law upon this subject were precisely the same. Lord Cottenham on that occasion reviewed the decisions of both countries, and said: "It is important to preserve the law of Scotland, where it really differs from that of England; but, where that is not so, and no principle of conflicting law is involved, it is a reproach to any system of law, that there should be, in matters of the same kind, and on subjects of the same legislation, a different rule of construction applied in one part of the kingdom and in another. In looking into the authorities in this case, I have in vain sought for a rule of Scotch law peculiar to that country; and in the English law, I find that the principle, on which the liability of employers is founded, was fully recognized in the time of Lord Holt, in Lane *v.* Cotton, and applied in Bush *v.* Steinman, where it was pushed to its fullest extent. Indeed, there is one Scotch case, that of Linwood *v.* Van Hathom, which is much more restrictive, in respect to the liability of trustees, than some of the English cases, and, certainly, more so than the case I have just mentioned. But it is supposed, that the regulations of the law are not the same in both countries upon this point. When trusts are created, it is plain, that, for the public benefit, the courts should have a common principle of dealing with them, on which might be engrafted such special rules as it seemed advisable to adopt, on account of the particular circumstances of one or other of the two countries. In England, we have long held, that trustees of a turnpike-road, are not liable in cases of this sort. Baker *v.* Harris, Humphries *v.* Mears, and Hall *v.* Smith. In all these cases it was distinctly held, that such trustees are not answerable but for their own personal default. There is another class of cases, in which it has been decided, that trustees, exceeding the authority given them, may be personally liable, but keeping within it, they are not answerable. In this instance, there is no pretence for setting up personal liability. In some cases, it is true, a person injured may be without a remedy; but the fact, that he may be so, will not alter the principle of law, which was left him in that situation. The British Plate-Glass Company *v.* Meredith, and Boulton *v.* Crowther, the former decided in 1792, are cases, that may be referred to, as showing, that, where trustees or commissioners are appointed under a public act, they are not responsible for the consequences of an act done within the scope of their authority. In both these cases, if the plaintiff had obtained a

§ 322. The same doctrine has been applied to public officers, acting in the army or navy, who are held responsible for their own acts and negligences, but are not held responsible for the misfeasances

judgment, it would have been against a public body as such, and it was not therefore necessary to consider the question of the personal liability of the trustees. In Hall *v.* Smith, Lord Wynford said: 'If commissioners, under an act of parliament, order something to be done, which is not within the scope of their authority, or are themselves guilty of negligence in doing that which they are empowered to do, they render themselves liable to an action; but they are not answerable for such as they are obliged to employ.' The true distinction is here taken, and the law, thus laid down, has ever since been recognized in England." Lord Brougham, on the same occasion, added: "That there was no such decision previous to 1820, is admitted; that all the cases, which have been decided, have been upon the terms of particular turnpike trusts, is not denied; that, therefore, no general rule has been laid down by the Scotch courts, may be taken as admitted; but it may be, that some case has been decided, extending the liability of persons for the acts of their agents, beyond the limit assigned to it by the law of England. But such is not the fact; on the contrary, it is found, that the liability of the principal is more restricted there than here. Such a case as that of Bush *v.* Steinman, which was satisfactorily decided here, if it had happened in Scotland, would not have been so decided there, for the reason I have just mentioned. The rule of liability, and its reason, I take to be this: I am liable for what is done for me and under my orders, by the man I employ, for I may turn him off from that employ, when I please; and the reason that I am liable is this, that, by employing him, I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it." Ante, § 320. [Where an action was brought to recover damages for an injury sustained by the plaintiff, who was upset while driving along the public highway in his gig, in consequence of the negligent paving of the street, it was held that the defendants, who were a public body clothed with a public trust, were not liable for the negligence of the servant of a surveyor whom they had appointed, in negligently paving the highway. Holliday *v.* St. Leonard's, 11 C. B. N. S. 192. And in a recent case in Massachusetts, McDonald *v.* Mass. Gen. Hospital, 120 Mass. 432, the court relied upon the decision in Holliday *v.* St. Leonard's, and held that the plaintiff, who was injured by the improper surgical attendance given him gratuitously at the defendant's hospital, could not recover damages therefor on the ground that the defendant corporation was a public charitable institution, and had no capital or funds out of which damages could be collected. In the case of Glavin *v.* Rhode Island Hospital, 12 R. I. 411, it was decided, however, that under similar circumstances the plaintiff could recover. And see Foreman *v.* Mayor of Canterbury, L. R. 6 Q. B. 214; Feoffees of Heriot's Hospital *v.* Ross, 12 Cl. & F. 507; Young *v.* Davis, 2 H. & C. 197; McKinnon *v.* Penson, 8 Ex. 319; Nichols *v.* Marsland, L. R. 10 Ex. 255; Ward *v.* Lee, 7 El. & Bl. 426; Parnaby *v.* Lancaster Canal Co., 11 Ad. & El. 223; Clothier *v.* Webster, 12 C. B. N. S. 798; Southampton Bridge *v.* Southampton Local Board of Health, 28 L. J. Q. B. 41; Brownlow *v.* Metropolitan Board, 13 C. B. N. S. 768; Whitehouse *v.* Fellowes, 10 C. B. N. S. 765; and the whole question has been recently discussed in the case of Mersey Docks *v.* Gibbs, L. R. 1 H. L. 93: in that case it was decided that a corporation which was entrusted by statute to

and negligences of the subordinate officers under them, who, indeed, are not ordinarily appointed by them, but are appointed by the government itself. Thus, it has been held, that the captain of a public sloop of war is not answerable for any damage done by her running down another vessel, the mischief appearing to have been done during the watch of the lieutenant, who was upon deck, and who had the actual direction and management of the steering and navigating of the sloop at the time, when the captain was not upon deck, nor was called there by his duty.[1]

perform certain works and receive tolls for the use of the works, although the tolls were not applicable to the use of the individual corporators, or to that of the corporation, but were devoted to the maintenance of the works, was liable for damages occasioned by the negligence of its servants. See Ruck *v.* Williams, 3 H. & N. 308; Mersey Docks *v.* Cameron, 11 H. L. Cases, 443. The rule laid down in the text may be considered, therefore, not to be the law as now laid down by the courts of England, and the case of Holliday *v.* St. Leonard's, and similar cases have been overruled by the later decisions. In the case of Coe *v.* Wise, L. R. 1 Q. B. 711, s. c. 7 B. & S. 831, it was held that drainage commissioners were answerable out of funds in their hands for damages caused by the bursting of a sluice through the negligence of their employees, and in Winch *v.* Conservators of the Thames, L. R. 9 C. P. 378, where a towing-path was out of order, and the horses of a person from whom they had taken toll, in consequence thereof fell into the water and were drowned, the defendants were held to be liable. — Ed.]

[1] Nicholson *v.* Mounsey, 15 East, 384. On this occasion, Lord Ellenborough said: "This is a case very important in its consequences, and, if I thought it as doubtful in principle as it is important, I should wish for further consideration before I delivered my opinion. But I cannot entertain any doubt upon it. Captain Mounsey is said to be liable for the damages awarded in this case, by considering him in the ordinary character of the master of the vessel, by means of which the injury was done to the plaintiff's property. But how was he master? He had no power of appointing the officers or crew on board; he had no power to appoint even himself to the station, which he filled on board; he was no volunteer in that particular station, merely by having entered originally into the naval service; but was compellable to take it, when appointed to it, and had no choice, whether or not he would serve with the other persons on board, but was obliged to take such as he found there, and make the best of them. He had no power, either of appointment or dismissal, over them. The case, therefore, is not at all like that of an owner or master, who, according to the principle laid down by Lord Chief Justice Eyre, in Bush *v.* Steinman, is answerable for those whom he employs, for injuries done by them to others, within the scope of their employment. The principle, perhaps, cannot be impugned, though that was a hard application of it. It does not, however, apply to this case. Here Captain Mounsey was a servant of his majesty, stationed on board this ship to do his duty there, together with others equally appointed and stationed there by the same authority, to do their several duties. They had each their several duties to perform, only they were to be performed on board the same ship. In the case of Lane *v.* Cotton, now established as law, Lord Holt

only differed from the other judges upon the point, whether in truth the clerk in the post-office, to whom the misconduct was in fact attributable, was the servant of the postmaster, or not. The facts of that case were, indeed, very different from the present; but, even with the power of appointment of such clerks, the postmasters were held not to be liable for their default. Then with respect to the case of Webb and others *v.* Drake, which at first was supposed to have been an authority in support of this action; if, as it is now stated, the captain had originally given the order to proceed in the course the ship was holding, when the damage was done, there might have been some color (I do not mean to say that there was any) for making him liable, as for his personal act. But here, there was no personal interference of the captain with the act of the lieutenant, by which the damage was occasioned; both, indeed, were servants of one common master; but there was no consent by the one to the act of the other, unless that can be inferred from the community of their services. This disposes of the rule, as it affects the case of Captain Mounsey; and it does not touch the case of the other defendant."

CHAPTER XIII.

RIGHTS OF AGENTS IN REGARD TO THEIR PRINCIPALS.

§ 323. HAVING thus considered the duties and obligations of agents to their principals; and their liabilities to their principals, and to third persons, as well in cases of contracts, as in cases of torts, we are next led to the consideration of the rights of agents in respect to their principals, which will, of course, include a review of the duties, obligations, and liabilities of the latter to the former.

§ 324. In the first place, then, as to the compensation of agents. Ordinarily, an agent, performing services for his principal, is entitled to a compensation therefor, unless he is a mere gratuitous agent or mandatary, or unless the nature of the service, or the understanding between the parties, repel such a claim. In respect to gratuitous agents or mandataries, the consideration of their rights properly belongs to a treatise on bailments, and need not be touched in this place.[1] In respect to agents or attorneys in fact, merely to sign a deed, or to do some other single ministerial act for another, it is not usual either to pay, or to stipulate for pay, for the execution of such fugitive acts. They are, ordinarily, treated as acts of friendship or benevolence, and are performed from a mere sense of duty, or from personal regard, and are wholly of a gratuitous nature.

§ 325. Cases may also exist, where services are not intended to be wholly gratuitous, but are to be compensated for; and yet, where the agent has, strictly speaking, no legal claim, as he has stipulated to leave the amount of the compensation altogether to the good-will and generosity, and sense of duty of his employers. Thus, for example,

[1] See Story on Bailm. 153, 154, 196–201. [Thus, to entitle a broker to a commission for his services, they must be rendered under an agreement with his principal, and, if voluntary, they give him no right to any compensation. Hinds *v.* Henry, 36 N. J. L. 328. So, where one as a friend and neighbor undertook to manage the moneyed affairs of an old lady without any stipulation as to his pay, and without intending to make any charge, it was held that he was not entitled after her death to claim any remuneration. Hill *v.* Williams, 6 Jones, Eq. (N. C.) 242; Montgomery *v.* Pickering, 116 Mass. 227. — ED.]

where an agent performed work for a committee under a resolution entered into by them, "That any service, to be rendered by him, shall be taken into consideration, and such remuneration be made, as shall be deemed right;" it was held, that no action would lie to recover recompense for services performed under the resolution, because the committee were to judge, whether any compensation was due, and ought to be paid, or not. In such a case, the agent is presumed to intend to throw himself entirely upon the mercy and generosity of his employers, and to insist upon no claim as a matter of right.[1] Agreements of this sort are said to happen not unfrequently in contracts with particular departments of the government. However, in cases of this sort, if it is not perfectly clear, that the agent contracts with this understanding; but his contract is, that he shall receive some reasonable remuneration for his services, the amount only to be fixed by his employers; he may then maintain a suit for a reasonable remuneration, if none is fixed by his employers, or none, which in a just sense, is considered as reasonable.[2]

§ 326. In the ordinary course of commercial agencies, a compensation is always understood to belong to the agent, in consideration of the duties and responsibilities which he assumes, and the labor and services which he performs. This compensation is commonly called a commission; and it is usually the allowance of a certain percentage upon the actual amount, or the value of the business done; as, for example, upon the value of the goods bought or sold in the course of the agency.[3] The amount of the commissions allowed to auctioneers, and brokers, and factors, and other regular agents, is generally regulated by the usage of trade at the particular place, or in the particular business, in which the agent is employed.[4] Where

[1] Taylor *v.* Brewer, 1 M. & Selw. 290.

[2] United States *v.* M'Daniel, 7 Peters, 1; United States *v.* Ripley, 7 Peters, 18; United States *v.* Fillebrown, 7 Peters, 28.

[3] 3 Chitty on Com. & Manuf. 221, 222; [*In re* John Penny, 14 Am. Law Rev. 533].

[4] Eicke *v.* Meyer, 3 Camp. 412; Cohen *v.* Paget, 4 Camp. 96; Roberts *v.* Jackson, 2 Starkie, 225; 3 Chitty on Com. & Manuf. 221, 222; Smith on Merc. Law, pp. 54, 55 (2d ed.); Id. pp. 100, 101 (3d ed. 1843); Chapman *v.* De Tastet, 2 Starkie, 294. [Thus, where A. entered into a contract to go to Africa upon a commission, but with an agreement that he should receive such commission only upon goods sent which were not "wet, dirty, or unmerchantable," he was held entitled to no commission upon goods which, by usage of trade, were "wet," though not unmerchantable. Warde *v.* Stuart, 1 C. B. N. S. 88. So, where an agent has been employed to sell land at no fixed rate of compensation, the value of his services must be ascertained from the amount usually paid land-

there is no usage of trade, a reasonable compensation, to be ascertained by the court, or jury, as the case may happen to arise at law or in equity, is allowed to the agent. But, in every case, the allowance will be governed by the positive agreement of the parties, whenever such an agreement exists; for where there is an express agreement, it follows, of course, that the implied compensation, from the usage of trade, or the presumed intention of the parties, wholly fails.[1] "Expressum facit cessare tacitum."

§ 327. The civil law adopted principles of a like nature. In cases of mandates, the services were treated, ordinarily, as gratuitous. If a particular salary or compensation was stipulated for or fixed, the contract fell under a different denomination, — the contract of hire, or *locatio-conductio*, and the salary or compensation was to be regularly paid.[2] "De salario autem, quod promisit, apud præsidem provinciæ cognitio, præbebitur."[3] But if there was no certainty in the promise, so that it was treated as a vague and indeterminate pollicitation or promise, no compensation was allowed. "Salarium

brokers for such services. Ruckman *v.* Bergholz, 38 N. J. L. 531. See also Sinclair *v.* Galland, 8 Daly, N. Y. 508. In Glenn *v.* Salter, 50 Ga. 170, where there was a doubt as to what commissions the defendant should be paid, evidence to show what compensation was allowed by other parties to their agents engaged in the same business was held admissible. See also Baring *v.* Stanton, L. R. 3 Ch. D.502; Great Western Ins. Co. *v.* Cunliffe, L. R. 9 Ch. 525. — Ed.]

[1] Bower *v.* Jones, 8 Bing. 65; Miller *v.* Livingston, 1 Caines, 349; Robinson *v.* New York Insur. Co. 2 Caines, 357. [Where the plaintiffs agreed to sell the defendant's farm for $1,800, for a commission of $200, and the defendant sold the farm himself for $1,600 to a party who had not seen the plaintiffs, but had had his attention called to the farm by an advertisement inserted by plaintiffs, it was held that the plaintiffs could recover nothing, not even their outlays, as by the agreement they were to receive no pay unless they made the sale. Charlton *v.* Wood, 11 Heisk. 19. And where M. employed a broker to purchase two lots of land for him, and the owner finally fixed a price at which he would sell, but would pay no commission, and the purchaser thereupon said he would see to it, it was held that the purchaser was liable for brokerage. Lynch *v.* McKenna, 85 How. Pr. 42. So, where the defendant was employed to sell a colliery on the terms, that whatever he could get over a certain price should be his own remuneration, and he made a sale for a large sum above the price fixed, it was held that the owner could not recover the sum he received, as the owner made a contract to that effect with him, which was valid. Morgan *v.* Elford, L. R. 4 Ch. D. 352. So, commissions on "net proceeds of homeward cargo, after deducting usual charges," were held to be payable only on sums actually realized after deducting bad debts and charges. Caine *v.* Horsfall, 1 Ex. 519. See Moore *v.* Maxwell, 2 C. & K. 554; Yelland's Case, L. R. 4 Eq. 350; Stevenson *v.* Maxwell, 2 Sandf. Ch. 274. — Ed.]

[2] 1 Bell, Comm. p. 481 (5th ed.).

[3] Cod. Lib. 4, tit. 35, l. 1; Pothier, Pand. Lib. 17, tit. 1, n. 74.

incertæ pollicitationis peti non potest."[1] Or, as Papinian expressed it: "Salarium incertæ pollicitationis neque extra ordinem recte petitur, neque judicio mandati, ut salarium tibi constituat."[2] If no particular sum was agreed on, but a compensation was to be paid, then a reasonable compensation was to be allowed and decreed by the proper tribunal. This reasonable compensation was to be proportionable to the nature and quantity of the particular commerce, business, or affair to be transacted, to the quality of the agent, to the time employed about it, and to the pains taken by the agent. "De proxenetico, quod et sordidum, solent, præsides cognoscere. Sic tamen, ut in his modus esse debeat, et quantitatis, et negotii, in quo operula ista defuncti sunt, et ministerium quale accommodaverunt."[3] Indeed, a similar doctrine must prevail in all countries which profess to be governed by the rules of enlightened reason and natural justice.[4]

§ 328. Besides the ordinary commissions, in some classes of agency, such as cases of factors for the sale of goods, extraordinary commissions are sometimes allowed, either by the usage of trade, or by the positive agreement of the parties. Of this character is what is commonly called a commission *del credere*, which is an extra compensation paid to a factor, in consideration of his undertaking to be responsible for the solvency and punctual payment of the debt, by the parties to whom the goods of his principal have been sold. The nature and extent of the obligation, thus created between the principal and factor, have been already, in some measure, discussed and considered.[5]

§ 329. The general rule of law, as to commissions, undoubtedly is, that the whole service or duty must be performed, before the right to any commissions attaches, either ordinary or extraordinary; for an agent must complete the thing required of him, before he is entitled to charge for it.[6] But cases may occur, in which an agent

[1] Cod. Lib. 4, tit. 35, l. 17; Pothier, Pand. Lib. 17, tit. 1, n. 74.

[2] Dig. Lib. 17, tit. 1, l. 56, § 3; Pothier, Pand. Lib. 17, tit. 1, n. 74.

[3] Dig. Lib. 50, tit. 14, l. 3; 1 Domat, B. 1, tit. 17, § 2, art. 2.

[4] See 1 Bell, Comm. p. 386, § 409 (4th ed.); Id. § 411; Id. pp. 481, 482 (5th ed.).

[5] Ante, §§ 83, 112, 215; 1 Bell, Comm. p. 387, § 411 (4th ed.); Id. pp. 481, 482 (5th ed.); Smith on Mere. Law, B. 1, ch. 5, § 2, p. 98; Id. § 3, pp. 100, 101 (3d ed. 1843).

[6] Post, § 331; Hamond *v.* Holiday, 1 Carr. & Payne, 384; Broad *v.* Thomas, 7 Bing. 99; Dalton *v.* Irvin, 4 Carr. & Payne, 289 [In the case of brokers employed to sell real estate, it is well settled that they are entitled to their

may be entitled to a remuneration for his services, in proportion to what he has done, although he has not done the whole service or

commission when they have found a purchaser, even though the negotiations are conducted and concluded by the principal himself. Timberman *v.* Craddock, 70 Mo. 638; Short *v.* Millard, 68 Ill. 292; Leete *v.* Norton, 43 Conn. 219; Sussdorf *v.* Schmidt, 55 N. Y. 319; Cavender *v.* Waddingham, 2 Mo. App. 551; Mooney *v.* Elder, 56 N. Y. 238; Haines *v.* Bequer, 9 Phil. 51; Newhall *v.* Pierce, 115 Mass. 457; Hinds *v.* Henry, 36 N. J. L. 328; Arrington *v.* Cary, 5 Baxter, 609; Grant *v.* Hardy, 33 Wisc. 668; Lane *v.* Albright, 49 Ind. 275. So, even where the vendor changes his mind and refuses to sell. Kock *v.* Emmerling, 22 How. U. S. 69. So, where there is a failure to complete the sale in consequence of a defect in title and no fault on the part of the brokers. Doty *v.* Miller, 43 Barb. 529; but, *contra*, Rockwell *v.* Newton, 44 Conn. 333. But where A. agreed to pay B., a broker, a fixed sum if he would find a party who would trade with him a lot of real estate, and B. found such party, and a written agreement between them was made, but never carried out, it was held that B. was entitled to his commission upon the execution of such agreement. Pearson *v.* Mason, 120 Mass. 53; Love *v.* Miller, 53 Ind. 294. So, where the plaintiff was employed to sell an advowson, his commission was held to be due when the contract was made, although payment under it was deferred. Lara *v.* Hill, 15 C. B. N. S. 45. And a change or modification in such contract as to the terms of payment made between the buyer and seller will not affect the broker's right to his commission. Lawrence *v.* Atwood, 1 Ill. App. 217. But it has been held that a real-estate broker does not earn his commission until he has found a purchaser who is ready to fulfil the contract and is such a customer as his principal is bound to accept, Coleman *v.* Meade, 13 Bush (Ky.), 358: or a purchaser who is ready to pay cash, and on the terms agreed upon between vendor and broker. Fraser *v.* Wyckoff, 63 N. Y. 445. And if the broker opens negotiations with a party, but abandons them without bringing the parties to terms, his principal can afterwards sell to the same party, and the broker is not entitled to his commission. Wylie *v.* Marine Nat. Bank, 61 N. Y. 415. A broker can only recover his commission for the sale of personal property when the sale has been actually completed. Thomas *v.* Lincoln, 71 Ind. 41. But where the contract is an entire contract for hire, the agent must recover the whole or none of his compensation; as, where a sailor takes a note for his wages for an entire voyage and dies before it is completed, it was held that the note could not be recovered by his administrator. Cutler *v.* Powell, 6 T. R. 320. And, where plaintiff was employed to build machinery in ten parts, and to receive a separate price for each part, and before the whole was completed it was destroyed, it was held that as he had contracted to do an entire work for a specific sum, he could recover nothing. Appleby *v.* Myers, L. R. 1 C. P. 615; 2 C. P. 651. And where an agent was to have a commission for all the goods bought of his principal through his aid, and he procured an order for goods which principal accepted but was unable to fill, it was held that the agent was entitled to his full commission. Lockwood *v.* Levick, 8 C. B. 603. And a principal cannot avoid paying a broker his commission by refusing to ratify the sale after it has been made by the broker, Bailey *v.* Chapman, 41 Mo. 536; Stewart *v.* Mather, 32 Wisc. 344: or by changing his terms after the purchaser has been found by the broker, Bash *v.* Hill, 62 Ill. 216. See Ward *v.* Laurence, 79 Ill. 295; Le Moyne *v.* Quimby, 70 Ill. 399; McGavock *v.* Woodlief, 20 How. U. S. 221;

duty originally required. This may arise, either from the known usage of the particular business, or from the entire performance being prevented by the act or neglect of the principal himself;[1] or, from the intervention of an overwhelming calamity, or irresistible force, which has rendered it impossible.[2] The same principle would probably be applied to the case of a person, who, during the time of his agency, and before it was completed, should become, by the death of his principal, his executor or administrator; in which case, by operation of law, his right to receive commissions for future acts would be merged in his new character of personal representative.[3]

§ 330. The right, however, of an agent to receive commissions, either ordinary or extraordinary, is subject to several exceptions, founded, either in the policy of the law, or in the nature of the contract. In the first place, an agent can never recover commissions for his services in any illegal transactions, whether they are positively prohibited by law, or by morals, or public policy.[4] Thus, for

Simpson *v.* Lamb, 17 C. B. 603; Antrobus *v.* Wickens, 4 F. & F. 291; Green *v.* Bartlett, 10 Jur. N. S. 78; Inchbald *v.* Neilgherry, &c. Co., 34 L. J. N. S. C. P. 15. — ED.]

[1] [Thus, a broker who is employed by a party to sell property at a given price and an agreed commission, and who has opened a negotiation with a purchaser, without concluding the bargain, is entitled to a proper proportion of the agreed commission if the principal concludes the bargain himself. Martin *v.* Silliman, 53 N. Y. 615. So, where the broker found a purchaser, and the principal declined to sell, and rescinded the agent's authority, the broker was held entitled to recover a reasonable compensation for his work and labor, which in this case was held to be the whole commission agreed upon. Prickett *v.* Badger, 1 C. B. N. S. 296; De Bernardy *v.* Harding, 8 Ex. 822. And a broker is held to be entitled to compensation in proportion to the service performed where the order is countermanded by his principal. Durkee *v.* Vt. Centr. R. R. Co., 29 Vt. 127. So, where a broker procured a loan on real estate from an insurance company and the negotiation was complete, but the company found the security unsatisfactory and refused to carry out the arrangement, it was held, that he could recover on a *quantum meruit* the value of his services. Green *v.* Reed, 3 F. & F. 226. See Chapin *v.* Bridges, 116 Mass. 105; Duke *v.* Harper, 14 Am. L. Rev. 252; Topping *v.* Healey, 3 F. & F. 325; Turner *v.* Webster, 24 Kans. 38. — ED.]

[2] See Hamond *v.* Holiday, 1 Carr. & Payne, 384; Broad *v.* Thomas, 7 Bing. 99; Reed *v.* Rann, 10 B. & Cressw. 438.

[3] Hovey *v.* Blakeman, 4 Ves. 596; Sheriff *v.* Axe, 4 Russ. 33.

[4] [Post, § 344. A broker who agrees to bring A. & B. together for a negotiation, but who takes no part in the actual bargain, can recover his compensation as agreed, although the contract is void as against public policy, as, for instance, a contract for advertising a lottery. Ormes *v.* Dauchy, 45 N. Y. Super. 85. So, where the contract is a wagering one. Crane *v.* Whittemore, 4 Mo. App. 510. The contract of a lobbyist for his services is against public

example, an agent employed to sell for another a public employment, such as an office in the customs, cannot support an action for any compensation for his services; for the transaction is against public policy.[1] So, an agent employed to assist in smuggling, and selling the smuggled goods, cannot support an action for any compensation.[2] So, an agent employed to buy or sell the stock of an illegal association, cannot recover any compensation therefor.[3] So, an agent employed to charter a ship for an illegal voyage, or to assist in carrying on an illegal voyage, cannot recover any compensation therefor.[4] So, an agreement to allow poundage to an agent upon the amount of the bills of all customers, recommended by him, will be held void, as a fraud upon the customers.[5]

§ 331. In the next place, the agent is entitled to his commissions

policy and void, and if the services of an attorney are so mingled with those of a lobbyist as to make one and the same contract, the whole contract for remuneration is vitiated, and the attorney cannot recover for work done. McBratney *v.* Chandler, 14 Am. Law Rev. 167. In Trist *v.* Child, 21 Wall. 441, it was held that a contract to take charge of a claim before Congress, and prosecute it as an agent and attorney for the claimant (the same amounting to a contract to procure by "lobby services," that is to say, by personal solicitation by the agent, and others supposed to have personal influence in any way with members of Congress, the passage of a bill providing for the payment of the claim), was void. Such a contract is distinguishable from one for purely professional services, within which category are included the drafting of a petition which sets forth the claim, attending to the taking of testimony, collecting facts, preparing arguments and submitting them either orally or in writing to a committee or other proper authority, with other services of like character intended to reach only the understanding of the person sought to be influenced. In the language of Swayne, J., "We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, *potior conditio defendentis*. Where there is turpitude, the law will help neither party." — Ed.]

[1] Stackpole *v.* Earl, 2 Wils. 133; Waldo *v.* Martin, 4 B. & Cressw. 319; 6 Dowl. & Ryl. 364; Parsons *v.* Thompson, 1 H. Black. 322; 3 Chitty on Com. & Manuf. 222, 223; Smith on Merc. Law, 54, 55 (2d ed.); Id. B. 1, ch. 5, § 2, p. 91; Id. § 3, pp. 100, 191 (3d ed. 1843); Josephs *v.* Pebre, 3 B. & Cressw. 639; Ante, §§ 195, 196.

[2] Story on Conflict of Laws, §§ 244–256; Armstrong *v.* Toler, 11 Wheat. 261, 262.

[3] Josephs *v.* Pebre, 3 B. & Cressw. 639.

[4] See Haines *v.* Busk, 5 Taunt. 521. [5] Wyburd *v.* Staunton, 4 Esp. 179.

only upon a due and faithful performance of all the duties of his agency in regard to his principal.[1] For it is a necessary element in all such cases, that, as the commissions are allowed for particular services to the principal, it is a condition precedent to the title to the commissions, that the contemplated services should be fully and faithfully performed.[2] If, therefore, the agent does not perform his appropriate duties, or if he is guilty of gross negligence, or gross misconduct, or gross unskilfulness, in the business of his agency, he will not only become liable to his principal for any damages, which he may sustain thereby, but he will also forfeit all his commissions.[3] Slight negligence, or slight omissions of duty, will not, indeed, ordinarily be visited with such serious consequences; although if any loss has occurred thereby to the principal, it will be followed by a proportionate diminution of the commissions.

§ 332. Thus, for example, it is ordinarily the duty of agents to keep regular accounts and vouchers of the business in the course of their agency; and if this duty is not faithfully performed, the omission will always be construed unfavorably to the rights of the agent, and care will be taken that the principal shall not suffer thereby.[4] Indeed, cases may occur of such gross neglect and misconduct of

[1] [Sea *v.* Carpenter, 16 Ohio, 412]; Ante, § 322.

[2] Ante, § 329.

[3] White *v.* Chapman, 1 Starkie, 113; Denew *v.* Daverell, 3 Camp. 451; Hamond *v.* Holiday, 1 Carr. & Payne, 384; 3 Chitty on Com. & Manuf. 222, 223; Hill *v.* Featherstonehaugh, 7 Bing. 569; Shaw *v.* Arden, 9 Bing. 287; Dodge *v.* Tileston, 12 Pick. 328, 332, 334; Smith on Merc. Law, 54, 55 (2d ed.); Id. B. 1, ch. 5, § 3, pp. 100–103 (3d ed. 1843); Callendar *v.* Oelrichs, 5 Bing. N. C. 58. In this last case, damages were recovered against an agent to insure for not giving notice to his principal of his failure to procure insurance, the court holding it to be an implied part of his duty. [So where an attorney in conducting a suit commits an act of negligence by which all previous steps become useless in the result, he cannot recover for any part of the business done. Bracey *v.* Carter, 12 Ad. & El. 373; and where a broker in negotiating an exchange of real estate negligently omitted to inform one of the parties that the other refused to accept one of the lots of land because the taxes were not paid, until the time limited for the exchange had expired, it was held that he could recover no commission for his services. Fisher *v.* Dynes, 62 Ind. 348. — Ed.]

[4] Ante, §§ 203, 204; Beaumont *v.* Boultbee, 11 Ves. 358; Lord Chedworth *v.* Edwards, 8 Ves. 48; Lupton *v.* White, 15 Ves. 439–443; Massey *v.* Banner, 4 Madd. 413; Smith on Merc. Law, 54, 55 (2d ed.); Id. B. 1, ch. 5, § 3, pp. 100, 101 (3d ed. 1843); Clarke *v.* Moody, 17 Mass. 145. On this ground it is, that if an agent whose duty it is to keep accounts, neglects it, and thereby his own property becomes so mixed up with that of his principal, that the one is not clearly distinguishable from the other, a court of equity will

agents, in this respect, as to amount to a complete forfeiture of all compensation which would otherwise belong to the agency.[1]

§ 333. So, if an agent should grossly misconduct himself in other respects, in the course of his agency, — as if he should violate his instructions, or if he should act injuriously to his principal without any authority; or if he should wilfully confound his own property with that of his principal, — in these and the like cases he might forfeit his whole title to compensation, if the circumstances were aggravated; or, at all events, he would be made to bear all the losses sustained by such misconduct.[2] He would also be held to account to his principal, and every doubtful circumstance would be construed unfavorably to his rights and interests.[3]

restrain him from disposing of stock standing in his own name, which may have been purchased with the money of his principal, until he clearly shows on oath, how much of it was, or might have been, bought with his own money, and how much with that of his principal. Ante, §§ 179, note, 205; Lord Chedworth *v.* Edwards, 8 Ves. 48; Panton *v.* Panton, cited 15 Ves. 440; Morgan *v.* Lewis, 4 Dow, 52; Hart *v.* Ten Eyck, 2 John. Ch. 108.

[1] 1 Story on Eq. Jurisp. § 468; White *v.* Lady Lincoln, 8 Ves. 371; Lupton *v.* White, 15 Ves. 439–443; Morgan *v.* Lewes, 4 Dow, 52. [But where an agent was employed to perform for a fixed salary all the duties of a general agent of a manufacturing corporation, one of which was to render a monthly account of the funds in his hands, it was held that a failure to render such accounts might have justified his dismissal, or made him liable for damages, but would not prevent his recovering his salary while he retained his position. Sampson *v.* Somerset Iron Works, 6 Gray, 120. The contrary, however, was held to be the law in the case of Smith *v.* Crews, 2 Mo. App. 269, where a captain of a steamboat kept his accounts so negligently that it was impossible to tell whether he owed the owners or not, and he was held to have thereby forfeited all right to compensation for his services. But where a party knows that his agent has disobeyed his instructions, yet has received accounts of sales, and given his agent notes for the balance due the agent, he cannot urge as a defence to the payment of such notes that his instructions were disobeyed. Beall *v.* January, 62 Mo. 434. See Follansbee *v.* Parker, 70 Ill. 11. — Ed.]

[2] [And where an agent in making a sale of real estate violates the instructions of his principal, it was held that he could recover no compensation for his services, in the absence of proof of a ratification by his principal. Hoyt *v.* Shipherd, 70 Ill. 309; Jones *v.* Hoyt, 25 Conn. 386. Nor can he recover any compensation for a transaction which he has carried on in violation of his duties to his principal, as where a manager of a company made a sale for the company. Etna Ins. Co., *In re* Owens, Ir. R. 7 Eq. 235, 424; Tyrrell *v.* Bank of England, 10 H. L. 26. So, where an agent to procure insurance procures it in his own name contrary to the orders of his principal, and the insurance is thereby invalidated, he is liable to his principal for the actual damages sustained by him. Sawyer *v.* Mayhew, 51 Me. 398. — Ed.]

[3] 1 Story on Eq. Jurisp. § 468; White *v.* Lady Lincoln, 8 Ves. 363; Lupton *v.* White, 15 Ves. 439–442; Chedworth *v.* Edwards, 8 Ves. 46; Ante, § 205;

§ 334. *A fortiori*, an agent will forfeit his commissions, if he engages in any transaction which amounts to a fraud upon his principal; such as betraying his trust, by acting adversely to his interests;[1] or by embarking his property in illegal transactions; or by being guilty of barratry; or by fraudulently misapplying his funds.[2] And, if the agent has stipulated to give his whole time and services to his principal, he will not be permitted to derive any commissions or other compensation for services in another employment during the same period.[3] Indeed, the commissions or other compensation earned by services in another employment, under such circumstances, would, in equity at least, seem properly to belong to the principal.[4]

§ 334 *a*. It is upon the same general ground that it is held, that the master of a ship is an agent bound to give all his time and attention to his principal. It is his duty, when the ship is employed on a trading adventure, to act for the common benefit of the owners; and when the ship is freighted, or chartered, to obtain freight upon the best terms he can for the owners, free from all bias of separate interest in himself, or of leave given to himself by the charterers to trade for himself; and it has been thought difficult to support a custom which, if legal, would entitle him to trade for himself, when it is his duty to trade to the best of his ability for the joint interest of himself and the other owners, and would give him a discretionary power to place his own interest in competition with the joint interests.[5]

Denew *v.* Daverell, 3 Camp. 451; White *v.* Chapman, 1 Stark. 113; Hamond *v.* Holiday, 1 Carr. & Payne, 384; Hurst *v.* Holding, 3 Taunt. 32; 3 Chitty on Com. & Manuf. 222; 2 Liverm. on Agency, 4, 6, 7 (ed. 1818). But see Templer *v.* McLachlan, 5 Bos. & Pull. 136; Dodge *v.* Tileston, 12 Pick. 328; Woodward *v.* Suydam, 11 Ohio (Stanton), 362; [Clarke *v.* Tipping, 9 Beav. 284].

[1] Hurst *v.* Holding, 3 Taunt. 32; Brown *v.* Croft, 6 Carr. & Payne, 16, n.

[2] See 3 Chitty on Com. & Manuf. 222, note (1); Id. 223; [Brannan *v.* Strauss, 75 Ill. 235].

[3] Thompson *v.* Havelock, 1 Camp. 527; Gardner *v.* McCutcheon, 4 Beav. 535; [Short *v.* Millard, 68 Ill. 292].

[4] [And where a broker acts for both parties in effecting an exchange of property, he can recover compensation from neither party, unless his double employment was known and assented to by both, Rice *v.* Wood, 113 Mass. 133: even though he acted in good faith, Scribner *v.* Collar, 40 Mich. 375: but where both parties have notice of such double employment, and both agree to pay his commissions, the broker can recover, Rowe *v.* Stevens, 53 N. Y. 621; Alexander *v.* No. Western Un., 57 Ind. 466: nor can a broker employed by one party receive a compensation from the other party to a contract for sale, unless his principal knows of it and assents, Carman *v.* Beach, 63 N. Y. 97; Bennett *v.* Kidder, 5 Daly, N. Y. 512. — Ed.]

[5] Gardner *v.* McCutcheon, 4 Beav. 535, 542.

§ 335. Another right of agents is, to be reimbursed all their advances, expenses, and disbursements made in the course of their agency, on account of, or for the benefit of, their principal.[1] This is naturally, nay, necessarily, implied from the very character of every agency to which such advances, expenses, and disbursements are incident, whenever they fall within the appropriate duty of the agent. Hence, all the incidental charges and expenses incurred for warehouse-room, duties, freight, lighterage, general average, salvage, repairs, journeys, and other acts done to preserve the property of the principal, and to enable the agent to accomplish the objects of the principal, are to be fully paid by the latter.[2] So, if an agent has, at the express or the implied request of his principal, necessarily incurred expenses in carrying on or defending suits for the benefit of his principal, those expenses must be borne by the latter, and the agent will be entitled to recover them from him.[3]

§ 336. But this liability of the principal proceeds upon the ground, that the advances, expenses, and disbursements have been properly incurred, and reasonably and in good faith paid, without any default on the part of the agent.[4] Under such circumstances, it will constitute no objection to the claim, that the advances, expenses, or disbursements have not been attended with all the benefits to the principals, which were expected or intended by the agent; for, his acts being in good faith, in the exercise of a sound judgment, and according to the ordinary course of business, the agent ought not, in justice, to be made responsible for any ultimate failure of success in the agency.[5] Cases may indeed occur of such peculiar

[1] Story on Bailm. §§ 196, 197. [Thus, a principal is liable to stockbrokers for their outlays and expenditures for raising money to carry stocks for him, especially where he is kept informed at short intervals of the state of his accounts with them, and knows the usage of the business and makes no objection. Robinson *v.* Norris, 51 How. Pr. 442. See Glenn *v.* Salter, 50 Ga. 170; White *v.* National Bank, 102 U. S. 658; Duncan *v.* Mobile & Ohio R. R. Co., 3 Woods, C. C. 567. — Ed.]

[2] Story on Bailm. §§ 196, 197, 357, 358; Smith on Merc. Law, 55 (2d ed.); Id. B. 1, ch. 5, § 3, pp. 100–103 (3d ed. 1843); 3 Chitty on Com. & Manuf. 222, 223; Ramsey *v.* Gardner, 11 John. 439.

[3] Hawes *v.* Martin, 1 Esp. 162; Delaware Ins. Co. *v.* Delaunie, 3 Binn. 295; Spurrier *v.* Elderton, 5 Esp. 1; Curtis *v.* Barclay, 5 B. & Cressw. 141.

[4] Capp *v.* Topham, 6 East, 392; Smith on Merc. Law, 56 (2d ed.), pp. 100–103 (3d ed. 1843); [Vandyke *v.* Brown, 4 Halst. Ch. 655; Toplis *v.* Crane, 5 Bing. N. C. 636].

[5] 1 Domat, B. 1, tit. 15, § 2, art. 2; Ersk. Inst. B. 2, tit. 3, § 38; Pothier, Traité de Mandat. notes 68, 75, 78, 79.

exigency as will justify an agent in making advances or incurring expenses beyond what ordinarily appertain to the regular course of business, for which, nevertheless, the principal will be bound to make him a full reimbursement.[1] And, *a fortiori*, this rule will apply where the agent is clothed with a discretionary authority.[2] However, if the agent has voluntarily and officiously and without any authority made advances or payments,[3] or has incurred unreasonable, useless, or superfluous expenses, the principal will not be bound to any reimbursement thereof; for it will be imputed to the fault, or negligence, or unskilfulness of the agent.[4]

§ 337. This doctrine, so consonant to reason and justice, is also recognized in the civil law. "Si mihi mandaveris, ut rem tibi aliquam emam, egoque emero meo pretio, habebo mandati actionem de pretio recuperando. Sed et si tuo pretio, impendero tamen aliquid bona fide ad emptionem rei, erit contraria mandati actio, aut si rem emptam nolis recipere. Simili modo, et si quod aliud mandaveris, et in id sumptum fecero.[5] Impendia, mandati exsequendi gratiâ facta, si bona fide facta sunt, restitui omnimodo debent; nec ad rem pertinet, quod is, qui mandâsset, potuisset, si ipse negotium gereret, minus impendere.[6] Sumptus bona fide necessario factos, etsi negotio finem adhibere procurator non potuit, judicio mandati restitui necesse est.[7] Si tamen nihil culpâ tuâ factum est, sumptus, quos in litem probabili ratione feceras, contrariâ mandati actione petere potes.[8] Si quid procurator citra mandatum in voluptatem fecit, permittendum ei

[1] Wolff *v.* Horncastle, 1 Bos. & Pull. 323; 3 Chitty on Com. & Manuf. 222, 223; Smith on Merc. Law, 55 (2d ed.); Id. B. 1, ch. 5, § 3, pp. 100–103 (3d ed. 1843).

[2] Wolff *v.* Horncastle, 1 Bos. & Pull. 323.

[3] Child *v.* Morley, 8 T. R. 610; Grove *v.* Dubois, 1 T. R. 112; Wilson *v.* Creighton, cited 1 T. R. 113; 3 Chitty on Com. & Manuf. 222; [Schrack *v.* McKnight, 84 Pa. St. 26].

[4] Edmiston *v.* Wright, 1 Camp. 88; Howard *v.* Tucker, 1 B. & Adolph. 712; 3 Chitty on Com. & Manuf. 222, 223; Pothier, Traité de Mandat. notes 75, 76, 78; Beaumont *v.* Boultbee, 11 Ves. 358.

[5] Dig. Lib. 17, tit. 1, l. 12, § 9; Pothier, Pand. Lib. 17, tit. 1, n. 53; Pothier, Traité de Mandat. n. 69.

[6] Dig. Lib. 17, tit. 1, l. 27, § 4; Pothier, Pand. Lib. 17, tit. 1, n. 67; 1 Domat, B. 1, tit. 15, § 1, art. 11, § 2, art. 2, 3; Pothier, Traité de Mandat. n. 78.

[7] Dig. Lib. 17, tit. 1, l. 56, § 4; Pothier, Pand. Lib. 17, tit. 1, n. 68; Heinecc. Elem. Pand. § 234; 1 Domat, B. 1, tit. 15, § 2, art. 3; Pothier, Traité de Mandat. n. 79.

[8] Cod. Lib. 4, tit. 35, l. 4; Pothier, Pand. Lib. 17, tit. 1, n. 68; 1 Domat, B. 1, tit. 15, § 2, art. 2; Pothier, Traité de Mandat. notes 75, 78, 79.

auferre, quod sine damno domini fiat, nisi rationem sumptûs istius dominus admittit."[1] The same maxims are fully recognized in the jurisprudence of the modern commercial nations of continental Europe. Pothier lays it down as a general doctrine, that the mandant or principal is, by the contract of mandate, bound to indemnify the mandatary or agent for all his disbursements, and for all the liabilities he has incurred in the execution of his agency.[2] And the same doctrine is found approved by many other jurists.[3]

§ 338. Not only may the advances and disbursements of an agent, made out of his own funds, be claimed from the principal, when they properly flow from the matters of his agency, but he will also be entitled to interest upon such advances and disbursements, wherever, from the nature of the business or the usage of trade or the particular agreement of the parties, it may fairly be presumed to be stipulated for, or due to the agent.[4] In this respect, the common law is in coincidence with the civil law. "Adversus eum cujus negotia gesta sunt, de pecuniâ, quam de propriis opibus, vel ab aliis, mutuo acceptam, erogasti, mandati actione pro sorte et usuris potes experiri.[5] Nec tantum id, quod impendi, verum usuras quoque consequar. Usuras autem non tantum ex mora esse admittendas, verum judicem æstimare debere si exeget a debitore suo quis, et solvit, cum uberrimas usuras consequeretur (æquissimum enim erit rationem ejus rei, haberi); aut si ipse mutuatus gravibus usuris, solvit. Et, ut est constitutum, totum hoc ex æquo et bono judex arbitrabitur."[6]

§ 339. Upon similar grounds, if an agent has, without his own default, incurred losses or damages in the course of transacting the business of his agency, or in following the instructions of his principal, he will be entitled to full compensation therefor.[7] Thus, for ex-

[1] Dig. Lib. 17, tit. 1, l. 10, § 10; Pothier, Pand. Lib. 17, tit. 1, n. 62; 1 Domat, B. 1, tit. 15, § 2, art. 2.

[2] Pothier, Traité de Mandat. notes 68–75.

[3] Ersk. Ins. B. 3, tit. 3, §§ 34, 38; Heinecc. Elem. Juris Nat. et Gent. Lib. 1, cap. 13, § 349; 1 Turnb. Heinecc. Elem. of Law of Nat. and Nat. § 349; 1 Domat, B. 1, tit. 15, § 2, art. 4, 6.

[4] Meech *v.* Smith, 7 Wend. 315; Delaware Ins. Co. *v.* Delaunie, 3 Binn. 295; Trelawney *v.* Thomas, 1 H. Bl. 303; Bruce *v.* Hunter, 3 Camp. 467; Calton *v.* Bragg, 15 East, 223; Loitard *v.* Graves, 3 Caines, 226; [Whitlock *v.* Hicks, 75 Ill. 460; Howard *v.* Smith, 56 Mo. 314; Strong *v.* Stewart, 9 Heisk. 137; Daniel *v.* Swift, 54 Ga. 113].

[5] Cod. Lib. 4, tit. 35, l. 1; Pothier, Pand. Lib. 17, tit. 1, n. 74.

[6] Dig. Lib. 17, tit. 1, l. 12, § 9; Pothier, Pand. Lib. 17, tit 1, notes 53, 73.

[7] Ramsay *v.* Gardner, 11 John. 439; Powell *v.* Trustees of Newburgh, 19

ample, if an agent, in consequence of a deception, practised upon him by his principal, and in pursuance of orders, innocently makes a false representation of the quality of the goods of his principal, and he is compelled to pay damages to a purchaser on account thereof, he will be entitled to a full remuneration from the principal.[1] So, if an

John. 284; D'Arcy *v.* Lisle, 5 Bing. 441; Stocking *v.* Sage, 1 Day, Conn. 522; Hill *v.* Packard, 5 Wend. 375; Rogers *v.* Kneeland, 10 Wend. 219. [Whether an agent is entitled to indemnity where he has been employed as sole agent for a principal for a fixed time, and, before the expiration of the time, the principal gives up the business, seems to be somewhat unsettled by the decided cases. In England it has been decided, that where a principal makes an agreement with an agent that he shall become the sole agent for the sale of coal, for seven years, and at the end of four years the principal sells his colliery, the agent is entitled to no indemnity, as there is no implied condition that the business shall be carried on, Rhodes *v.* Forwood, L. R. 1 App. Cas. 256: so, with a contract to carry mails, Churchward *v.* The Queen, L. R. 1 Q. B. 173: and so, in the case of an insurance company which failed, and its agent thereupon ceased to act for it, *Ex parte* Maclure, L. R. 5 Ch. 737. Where, however, the contract of hiring provides for the payment of a certain sum to the agent upon his losing his position, it has been held that in such case there was an obligation upon the principal to continue his business, or to pay the sum agreed upon, Sterling *v.* Maitland, 5 B. & S. 840; *Ex parte* Logan, L. R. 9 Eq. 149: but where the articles of association of a company contained a clause that the plaintiff should be the solicitor, and should transact all the legal business for the company, and should not be removed except for misconduct, it was held that plaintiff could not recover damages if the company did not employ him, Eley *v.* Positive, &c. Ass. Co., L. R. 1 Ex. D. 20, 88. In this country it was held, in one case, that an agreement between an employer and his salesman, that the latter should devote his whole time to his employer's business for two years for a certain salary, did not oblige the employer to continue in business for two years, and if he became bankrupt during the first year the salesman could not recover compensation beyond that time, Orr *v.* Ward, 73 Ill. 318: while in the case of Lewis *v.* Atlas Mut. Life Ins. Co., 61 Mo. 534, it was held that a corporation must pay damages to an insurance agent for a breach of an agreement that he should act as their sole agent for a specified period, and that the corporation was bound to continue in business during the time fixed. See also Sentance *v.* Hawley, 13 C. B. N. S. 458; Elliott *v.* Walker, 1 Rawle, 126: Green *v.* Goddard, 9 Metc. 212; Howe *v.* Buffalo, &c. R. R. Co., 37 N. Y. 297. And where the plaintiff agreed to make cement for the defendant, who agreed to pay therefor so much a week for the first year, and so much for the second year, it was held that the defendant was under no obligation to employ the plaintiff, but he must pay him the agreed wages if plaintiff was ready to perform the services. Aspdin *v.* Austin, 5 Q. B. 671.— ED.]

[1] Southern *v.* How, Bridg. 126; 2 Molloy de Jur. Marit. B. 3, ch. 8, § 6, pp. 329, 330; Cro. Jac. 468. [Thus, where an agent innocently sold repudiated South Carolina bonds, without disclosing his principal, it was held that he could recover from his principal all damages he had suffered from making such sale. Maitland *v.* Martin, 86 Pa. St. 120. So, where an agent has suffered damages in defending a suit on his principal's behalf, if the loss occurred with-

agent has innocently, and without any notice of an adverse title, converted the property of a third person, under the direction or authority of his principal, claiming it as owner, and a recovery is subsequently had against him therefor by such third person, he will be entitled to a reimbursement from his principal.[1] Indeed, it may be stated, as a general principle of law, that an agent who commits a trespass or other wrong to the property of a third person, by the direction of his principal, if at the time he has no knowledge or suspicion that it is such a trespass or wrong, but acts *bona fide*, will be entitled to a reimbursement and contribution from his principal for all the damages which he sustains thereby.[2] For, although the general doctrine of the common law is, that there can be no reimbursement or contribution among wrong-doers, whether they are principals or are agents; yet that doctrine is to be received with the qualification, that the parties know at the time that it is a wrong.[3] And in all these cases there is no difference whether there be a promise of indemnity or not; for the law will not enforce a contract of indemnity against a known and meditated wrong; and, on the other hand, where the agent acts innocently, and without notice of the wrong, the law will imply a promise on the part of the principal to indemnify him.[4] The same doctrine applies to all other cases of losses or damages sustained by an agent in the course of the business of his agency, if they are incurred without any negligence or default on his own part.[5]

out any fault on his part, and from the fact of his agency. Frixione *v.* Tagliaferro, 10 E. F. Moore, P. C. 175. And so where an agent was obliged to make allowances to parties to whom he had sold cotton for his principal, on account of defective packing. Beach *v.* Branch, 57 Ga. 362. — Ed.]

[1] Adamson *v.* Jarvis, 4 Bing. 66; Allaire *v.* Ouland, 2 John. Cas. 54; Coventry *v.* Barton, 17 John. 142; Avery *v.* Halsey, 14 Pick. 174; [Dugdale *v.* Lovering, L. R. 10 C. P. 196].

[2] Adamson *v.* Jarvis, 4 Bing. 66; Fletcher *v.* Harcott, Hutton, 55; Powell *v.* Trustees of Newburgh, 19 John. 284; Avery *v.* Halsey, 14 Pick. 174; Coventry *v.* Barton, 17 John. 142.

[3] Merryweather *v.* Nixon, 8 T. R. 186; Adamson *v.* Jarvis, 4 Bing. 66. The case of Farebrother *v.* Ansley, 1 Camp. 343, seems overturned in its leading principle by that of Adamson *v.* Jarvis, 4 Bing. 66; Fletcher *v.* Harcott, Hutton, 55; s. c. Winch. 48; Humphrey *v.* Pratt, 2 Dow & Clarke, 288; Betts *v.* Gibbons, 2 Adolph. & Ellis, 57; D'Arcy *v.* Lisle, 5 Binn. 441; Powell *v.* Trustees of Newburgh, 19 John. 284; Coventry *v.* Barton, 17 John. 143; Avery *v.* Halsey, 14 Pick. 174; Jacobs *v.* Pollard, 10 Cush. 287; Pearson *v.* Skelton, 1 Mees. & Wels. 504.

[4] Ibid.

[5] 3 Chitty on Com. & Manuf. 222, 223; Smith on Merc. Law, 55, 56 (2d ed.); Id. pp. 100–103 (3d ed. 1843); Capp *v.* Topham, 6 East, 392.

§ 340. Here again the common law only follows out the beneficent principles of the civil law; for, as, on the one hand, the agent is not permitted to reap any of the profits of his agency properly belonging to his principal;[1] so, on the other hand, he is held entitled to be indemnified against all losses which have been innocently sustained by him upon the same account; but not for losses sustained by his own default or negligence. "Ex mandato apud eum, qui mandatum suscepit, nihil remanere oportet; sicuti, nec damnum pati debet.[2] Hæc ita puto vera esse, si nulla culpa ipsius, qui mandatum vel depositum susceperit, intercedat."[3] The reason given is very satisfactory. "Multo tamen æquius esse, nemini officium suum, quod ejus, cum quo contraxerit, non etiam sui commodi causâ susceperat, damnosum esse."[4]

§ 341. But it is not every loss or damage for which the agent will be entitled to reimbursement from his principal. The latter is liable only for such losses and damages as are direct and immediate, and naturally flow from the execution of the agency. If, therefore, the losses or damages are casual, accidental, oblique, or remote, the principal is not liable therefor. In short, the agency must be the cause, and not merely the occasion, of the losses or damages, to found a just right to reimbursement.[5] This also was the rule promulgated in the civil law. "Non omnia, quæ impensurus non fuit, mandatori imputabit; veluti, quod spoliatus sit a latronibus, aut naufragio res amiserit, vel languore suo suorumque apprehensus, quædam erogaverit. Nam hæc magis casibus, quam mandato, imputari oportet."[6] The modern jurists of Europe have fully recognized the same doctrine.[7] Pothier, in broad language, lays it down, that all losses suffered by the agent (the mandatary), in the course or execution of his agency, and of which the agency was the proximate cause, are to be reimbursed by his principal.

[1] Ante, §§ 192, 207, 214.

[2] Dig. Lib. 17, tit. 1, l. 20; Pothier, Pand. Lib. 17, tit. 1, n. 31; 1 Domat, B. 1, tit. 15, § 2, art. 4, 6.

[3] Dig. Lib. 47, tit. 2, l. 61, § 7; Dig. Lib. 17, tit. 1, l. 26, § 7; Pothier, Pand. Lib. 17, tit. 1, n. 10; Pothier, Traité de Mandat. n. 75.

[4] Dig. Lib. 47, tit. 2, l. 61, § 5; Pothier, Pand. Lib. 17, tit. 1, n. 60; Pothier, Traité de Mandat. n. 75.

[5] [Duncan *v.* Hill, L. R. 8 Ex. 242.]

[6] Dig. Lib. 17, tit. 1, l. 26, § 6; Pothier, Pand. Lib. 17, tit. 1, n. 61; Pothier, Traité de Mandat. n. 76.

[7] Ersk. Inst. B. 3, tit. 3, §§ 34, 38; Pothier, Traité de Mandat. n. 75–78; Heinecc. Elem. Juris. Nat. et Gent. Lib. 1, ch. 13, § 349, n.

But he adds, that we are carefully to distinguish whether the execution of the agency has been the cause, or only the occasion, of the loss; for, if it has been only the occasion, the principal is not bound to indemnity.[1]

§ 342. Attempts have been sometimes made to limit the rights of certain agents, such, for example, as factors, for advances upon goods of the principal in their possession, to a mere lien on the goods themselves, so as to exclude all personal recourse to, and responsibility of, the principal for such advances, if there happens to be a loss or failure of the fund, so that it becomes insufficient to repay the advances. Such a limited responsibility may doubtless arise, wherever there is an express agreement between the parties to that effect, or a clear usage of trade from which such an agreement may be inferred.[2] But, independently of such an agreement or usage, the general rule of law is, that advances by a factor are deemed to be made upon the joint credit of the principal and of the fund, including a lien on the latter as well as a personal responsibility of the former, for the full amount.[3] Where a factor receives a *del credere* commission upon the sale of goods, and he has made advances thereon of a less amount than the price for which they are sold, he must be deemed, by the very guaranty arising out of that commission, to waive any personal recourse to his principal for such advances. If the advances exceed the price, he must be deemed to waive any personal recourse to his principal, to the extent of the price for which he sells the goods, and to rely solely upon the fund realized from the sale for his reimbursement *pro tanto*. If therefore the advances made are less than the amount for which the goods are

[1] Pothier, Traité de Mandat. n. 75, 76. [For, to give the agent a right to remuneration from his principal, he must have at the time acted strictly in the place of the principal, in accordance with and representing his principal's will, and not his own; and the business must be strictly that of the principal, and not in any respect that of the agent. Thus, in a recent case, C. contracted with a town to remove a ledge of rock from the highway for a certain price and the stone he then contracted with A. to build a dam for him; with said stone, to be paid by the day while he was getting out the stone and building the dam, A. furnishing the powder for the blasting, but having no control over it. While C. was getting out the stone, the building of I. was injured by a rock thrown upon it, for which C. was compelled to pay damages. It was held he could not recover them of A. Corbin *v.* American Mills, 27 Conn. 274. — R.]

[2] Burrill *v.* Phillips, 1 Gall. 360; Peisch *v.* Dickson, 1 Mason, 10; Corlies *v.* Cumming, 6 Cowen, 181; [Hidden *v.* Waldo, 55 N. Y. 294].

[3] Ibid.; Post, §§ 350, 385.

sold, the law, in order to prevent a circuity of action, founded upon the guaranty, will deem the whole advances paid or extinguished as to the principal, beyond what the factor may actually receive from the sales; and, if the advances are more than the amount of the sales; then the principal will be personally liable only for the excess beyond that amount, and the residue will be deemed paid or extinguished as the principal. A waiver of personal recourse to the principal may also be presumed from the subsequent conduct of the factor; as if he sells the goods upon credit, and then settles the account with the principal, deducting his commissions before the credit has expired, and pays over the balance to the principal; for, in such a case, the payment of the balance may fairly be treated as an assumption of the outstanding debt on the part of the factor.[1]

§ 343. It has been said, that, if an agent abroad — as, for example, a foreign factor — should, at his own risk and peril, evade the payment of foreign customs and duties, he would still be entitled to charge them against his principal, as if they had been actually paid. But it may well be doubted whether this doctrine is sound or maintainable.[2] For the factor, by his conduct, violated his own proper duty to his principal, if the act was unauthorized, since he thereby subjected the goods of the latter to the peril of confiscation and forfeiture; and certainly no man can be permitted to found a claim, in a court of justice, upon his own misconduct. Besides, the customs or duties not having been paid, there is no ground to assert that the principal ought to reimburse the agent for

[1] Oakley *v.* Crenshaw, 4 Cowen, 250. See Robertson *v.* Livingston, 5 Cow. 473; Consequa *v.* Fanning, 3 John. Ch. 600. See Greely *v.* Bartlett, 1 Greenl. 172; [Hapgood *v.* Batchellor, 4 Met. 576].

[2] Smith *v.* Oxenden, 1 Ch. Cas. 25; 1 Eq. Abridg. 369; Borr *v.* Vandall, 1 Ch. Cas. 30; s. c. Nelson, Ch. 87; Knipe *v.* Jesson, 1 Ch. Cas. 76; Francis's Maxims (ed. 1739), Max. 4, Pl. 8, p. 24; 3 Salk. 235. This doctrine was disapproved of by Lord Keeper North, in an anonymous case in Skinner, 149, who said, that he was not satisfied with the case of Vandervaldy *v.* Barry, or Borr *v.* Vandall, 1 Ch. Cas. 30; for the factor ventured his master's goods, as well as his own life, by his smuggling. 13 Viner, Abridg. Factor, B. pl. 6, in marg. The remark was undoubtedly meant to repel the suggestion, made in the case of Vandervaldy *v.* Barry, that the factor had put his life in danger by the smuggling; by showing that, however that might be, the factor had no right to put the principal's goods also in peril by his fraudulent conduct. Smith on Merc. Law, p. 55 (2d ed.); Id. B. 1, ch. 5, § 8, p. 102 (3d ed. 1843). Can commercial agents, who are bound to insure the property of their principals, charge commissions, if they omit this duty, as if it were done?

what he has not in fact paid, but what, contrary to his duty, he has omitted to pay. Indeed, it is difficult to perceive how an agent can, in law or in morals, found any just claim against his principal, upon a fraud committed upon a foreign government.[1] On the other hand, if the principal, either expressly or impliedly, authorized the agent so to evade the payment of the customs or duties, the principal, and not the agent, ought to have the benefit thereof, unless there be some stipulation to the contrary between them.[2]

§ 344. In respect to agencies in illegal transactions, the same principles apply as to advances and disbursements by agents, as apply to their commissions.[3] None are recoverable, either in law or equity.[4] For the law will not (as we have already seen) assist any persons in evading the obligations imposed upon the whole community to conform to its directions and prohibitions.[5] As between principals and agents, in all such cases, the guilt is deemed to be equal; and the maxim is, "In pari delicto potior est conditio defen-

[1] In 1 Eq. Abridg. 369, 370 (2d ed.), there is a very sensible note on this very point, which deserves to be transcribed, as importing a lofty morality, worthy of universal homage. After referring to the doctrine, that such an evasion of our own laws would be unjustifiable, the writer says: "And why not be deemed a fraud to cheat a foreign state of its customs? Fraud is always the same, though an allowance in one case is more prejudicial than another. And surely a court of chancery should not connive at anything so detrimental to good faith, commerce, and reciprocal assurance, as even smuggling into foreign ports. It is not proceeding on the great maxim, Quod tibi non vis, alteri non feceris, to make any distinction in this case in our favor." It is to be regretted that this doctrine has not been fully carried out and sustained in the commercial law. See Story on Conflict of Laws, § 245; Planchè *v.* Fletcher, Doug. 250; Boucher *v.* Lawson, Cas. temp. Hard. 84. See Ante, §§ 195–197; Smith on Merc. Law, § 3, p. 55 (2d ed.); Id. pp. 100–103 (3d ed. 1843); Molloy, de Jur. Marit. B. 2, ch. 8, §§ 6, 7.

[2] But see Smith *v.* Oxenden, 1 Ch. Cas. 25; 3 Salk. 235.

[3] [Ante, § 330. Thus, where A. received money to buy votes at an election for parliament, and his principal knew the purpose for which it was to be used, it was held that he could not recover the balance in the agent's hands. Bayntun *v.* Cattle, 1 Moo. & Rob. 265. So, it was held that agents, who were insurance brokers, could not recover back premiums paid for illegal insurance, as the whole transaction was void. Allkins *v.* Jupe, L. R. 2 C. P. D. 375. Nor can a broker recover either money advanced to pay losses incurred in stock gambling, nor commissions for his services therein. Fareira *v.* Gabell, 89 Pa. St. 89. See Pointer *v.* Smith, 7 Heisk. 137. — Ed.]

[4] Ante, §§ 195, 196, 235, and note, 330; Story on Conflict of Laws, §§ 246–248; 1 Liverm. on Agency, ch. 1, § 2, pp. 14–21 (ed. 1818); Id. ch. 8, § 7, pp. 467–470; Josephs *v.* Pebrer, 3 B. & Cressw. 639; The Vanguard, 6 Rob. 207.

[5] Ibid.

dentis;"[1] or, as the Pandects state it: "In pari causâ possessor potior haberi debet."[2] The parties, therefore, must trust exclusively to the personal faith of each other, as to the fulfilment of their mutual stipulations in illegal transactions. The law will not assist the agent to recover his expenses or advances, or the principal to recover his property or its proceeds. Each party is left precisely where he is found at the time of the controversy to bear the burden of his own abandonment of his duty to the law of his country.[3] We have already seen that this same wholesome doctrine is fully recognized in the foreign law;[4] and it can admit of no question that it is deeply founded in the precepts of Christianity.

§ 345. The civil law proceeded upon the basis of the same wholesome principles. Where money was paid on an illegal or an immoral transaction, in which both parties participated, it could not be recovered from the principal, for whose benefit it was advanced. And, on the other hand, if it had been repaid, it could not be redemanded by the principal. But, where the principal only was engaged in the illegal transaction, there money advanced by the agent innocently, and without knowledge, which enabled the principal to accomplish it, was recoverable by the agent. "[Ob rem] turpem autem, aut ut dantis sit turpitudo, non accipientis; aut, ut accipientis duntaxat, non etiam dantis; aut utriusque.[5] Ubi autem et dantis et accipientis turpitudo versatur, non posse repeti dicimus. Quotiens autem solius accipientis turpitudo versatur, repeti posse.[6] Si ob turpem causam promiseris Titio; quamvis, si petat, exceptione doli mali, vel in factum summovere eum possis; tamen si solveris, non posse te repetere; quoniam, sublatâ proximâ causâ stipulationis, quæ propter exceptionem inanis esset, pristina causa, id est, turpitudo, superesset. Porro autem, si et dantis et accipientis turpis causa sit, possessorem potiorem esse. Et ideo repetitionem cessare, tametsi, ex stipulatione solutum est."[7]

[1] Ante, §§ 195, 196, 235; Holman *v.* Johnson, Cowp. 341; 1 Liverm. on Agency, ch. 1, §§ 2, 14, 15 (ed. 1818).

[2] Dig. Lib. 50, tit. 17, l. 128; Pothier, Pand. Lib. 12, tit. 5, n. 7.

[3] Josephs *v.* Pebrer, 3 B. & Cressw. 639; Holland *v.* Hall, 1 B. & Ald. 53; Armstrong *v.* Toler, 11 Wheat. 258; Ante, § 235, and note.

[4] Ante, §§ 195, 196; Pothier, Traité d'Assur. n. 58; Dig. Lib. 17, tit. 1, l. 6, § 3; Cod. Lib. 2, tit. 3, l. 6.

[5] Dig. Lib. 12, tit. 5, l. 1; Pothier, Pand. Lib. 12, tit. 5, n. 1.

[6] Dig. Lib. 12, tit. 5, l. 3, 4, §§ 2, 3; Pothier, Pand. Lib. 12, tit. 5, notes 2, 7, 9.

[7] Dig. Lib. 12, tit. 5, l. 8; Pothier, Pand. Lib. 12, tit. 5, n. 10.

§ 346. A distinction was formerly attempted to be made between cases which involved an illegality resulting from positive law (*malum prohibitum*), and an illegality existing in the very nature of the transaction, upon principles of natural, moral, and public law (*malum in se*). In the former case, it was held, that money, knowingly advanced to or for the principal, upon an illegal transaction, might be recovered by the agent; in the latter case, that it could not.[1] But this distinction is now justly repudiated.[2] Hence, if an agent should be employed to buy smuggled goods, and he should pay for the goods, and they should come to the hands of his employer, the agent could not recover for these advances from the employer.[3] So, if an agent should knowingly advance money to pay for illegal insurances, or for stock-jobbing transactions of his employer, he could not recover it from the latter.[4] So, if an agent should knowingly advance money to his employer to game with, it would not be recoverable.[5]

§ 347. But, although the rule is thus simple and clear in its elements, it is occasionally somewhat nice and difficult in its application to particular cases. A distinction has been taken between cases where the money is knowingly advanced in furtherance of an illegal transaction, or where it grows immediately out of it, and cases where the money is knowingly advanced in a transaction collateral to, although remotely connected with, the illegal transaction. In the latter case, the money advanced may be recovered. The ground of the distinction is, that the new contract, in the latter case, is one degree removed from the original illegal transaction; and, as it is in itself perfectly legal in its consideration and formation as an independent contract, it ought not to be tainted by the illegality of the original transaction, although at the time the agent

[1] Faikney *v.* Reynous, 4 Burr. 2069; Petrie *v.* Hannay, 3 T. R. 418.

[2] Steers *v.* Lashley, 6 T. R. 61; Bensley *v.* Bignold, 5 B. & Ald. 335; *Ex parte* Mather, 3 Ves. 373; Brown *v.* Turner, 7 T. R. 631; Mitchell *v.* Cockburne, 2 H. Bl. 379; Aubert *v.* Maize, 2 Bos. & Pull. 271; Webb *v.* Brooke, 3 Taunt. 6; *Ex parte* Bell, 1 M. & Selw. 751; Canaan *v.* Bryce, 3 B. & Ald. 180, 183; Langton *v.* Hughes, 1 M. & Selw. 594; Armstrong *v.* Toler, 11 Wheat. 258.

[3] *Ex parte* Mather, 3 Ves. 373; Armstrong *v.* Toler, 11 Wheat. 258.

[4] *Ex parte* Mather, 3 Ves. jr. 372; Amory *v.* Merryweather, 2 B. & Cressw. 575; Aubert *v.* Maize, 2 Bos. & Pull. 271; Canaan *v.* Bryce, 3 B. & Ald. 179. But see Armstrong *v.* Toler, 11 Wheat. 258; Brown *v.* Duncan, 10 B. & Cressw. 93; Stebbins *v.* Leo Wolf, 8 Cush. 137; Ward *v.* Van Duzer, 2 Hall, 162.

[5] McKinnell *v.* Robinson, 3 Mees. & Wels. 434. [But the plaintiff recovered money advanced to his principal for a wagering contract in Rosewarne *v.* Billing, 15 C. B. N. S. 316. — Ed.]

had knowlege of it. Thus, if money due to a principal on an illegal transaction should be paid over to his agent for him by the party from whom it is due, it has been held, that the principal may recover it from the agent; for the contract of the agent to pay the money to his principal is not immediately connected with the illegal transaction; but it grows out of the receipt of the money for the use of his principal.[1] Upon the like ground, it is said, that an agent who has knowingly made advances to pay the duties due to the government upon goods which have been previously and fraudulently, by a collusive capture, introduced into the country by the principal, but in which transaction the agent had no part or co-operation, may recover such advances.[2] So, where goods are smuggled into the country contrary to law, and they are seized, and a prosecution is instituted against the principal, if an agent, knowing the facts, should advance money to assist his employer in his defence upon that occasion, it is said, that he may recover the money advanced from his principal; because such advance is upon a new and valid contract, unconnected with the original illegal act, although remotely caused by it.[3] But in all these cases, so put, if the agent is connected with the original illegal transaction, or the advance is a part of the original scheme, and in furtherance of it, it will not be recoverable from the principal; for then the agent is properly to be deemed a partaker in the illegality, *particeps criminis*.[4]

[1] Tenant *v.* Elliot, 1 Bos. & Pull. 4; Farmer *v.* Russell, 1 Bos. & Pull. 296. See Warren *v.* Manuf. Ins. Co. 13 Pick. 518. In Wetherell *v.* Jones, 3 B. & Adolph. 221, where spirits had been sold without a regular permit, in violation of law, Lord Tenterden said: "We are of opinion that the irregularity of the permit, though it arises from the plaintiff's own fault, and is a violation of the law by him, does not deprive him of the right of suing upon a contract, which is in itself perfectly legal; there having been no agreement, express or implied, in that contract, that the law should be violated by such improper delivery. Where a contract which a plaintiff seeks to enforce, is expressly, or by implication, forbidden by the statute or common law, no court will lend its assistance to give it effect; and there are numerous cases in the books where an action on the contract has failed, because either the consideration for the promise, or the act to be done, was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy. But where the consideration and the matter to be performed, are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law, not contemplated by the contract, in the performance of something to be done on his part." See also Levy *v.* Yates, 8 Adolph. & Ellis, 129.

[2] Armstrong *v.* Toler, 11 Wheat. 258.

[3] Armstrong *v.* Toler, 11 Wheat. 258.

[4] Armstrong *v.* Toler, 11 Wheat. 258; Farmer *v.* Russell, 1 Bos. & Pull.

§ 348. An agent may not only forfeit his title to the repayment of advances and disbursements, made by him on account of his

296, per Eyre, Ch. J., and Brooke, J.; Warren *v.* Manuf. Ins. Co. 13 Pick. 518. The opinion of Brooke, J., is very able and exceedingly difficult to be answered. He puts the grounds against a recovery in a very strong light. The cases in the books are not easily reconcilable with each other; and Faikney *v.* Reynous, 4 Burr. 2069, and Petrie *v.* Hannay, 3 T. R. 418, are deemed to be overruled in England. They, however, were not so treated in the Supreme Court of the United States, in Armstrong *v.* Toler, 11 Wheat. 258. In this last case, the subject was very much considered, and the leading authorities then existing critically examined. In this case, Toler brought an action to recover money paid by him on account of the goods of Armstrong and others, consigned to Toler, which had been seized as imported contrary to law. Toler, upon the seizure, became a surety on the stipulation bond given upon the delivery up of the goods under the seizure, to abide the event of the suit; and Armstrong's portion of the goods was delivered to him upon his promise to pay Toler his proportion of the amount for which Toler should become liable. The goods were condemned; and Toler paid the appraised value, and brought this action to recover the amount of the money so paid for Armstrong's proportion of the goods. At the trial, Armstrong founded his defence upon the illegality of the transaction. Mr. Justice Washington at the trial, said: "The rule of law under which the defendant seeks to shelter himself against a compliance with his contract, to indemnify the plaintiff for all sums, which he might have to pay on account of the goods shipped from New Brunswick for the defendant, and consigned to the plaintiff, is a salutary one, founded in morality and good policy, and which recommends itself to the good sense of every man, as soon as it is stated. The principle of the rule is, that no man ought to be heard in a court of justice who seeks to enforce a contract founded in, or arising out of, moral or political turpitude. The rule itself has sometimes been carried to inconvenient lengths; the difficulty being, not in any unsoundness in the rule itself, but in its fitness to the particular cases to which it has been applied. Does the taint in the original transaction infect and vitiate every contract growing out of it, however remotely connected with it? This would be to extend the rule beyond the policy which produced it, and would lead to the most inconvenient consequences. Carried out to such an extent it would deserve to be entitled a rule to encourage and protect fraud. So far as the rule operates to discourage the perpetration of an immoral or illegal act, it is founded in the strongest reason; but it cannot safely be pushed further. If, for example, the man who imports goods for another by means of a violation of the laws of his country, is disqualified from founding any action upon such illegal transaction for the value or freight of the goods, or other advances made on them, he is justly punished for the immorality of the act, and a powerful discouragement from the perpetration of it is provided by the rule. But after the act is accomplished, no new contract ought to be affected by it. It ought not to vitiate the contract of the retail merchant who buys these goods from the importer, that of the tailor who purchases from the merchant, or of the customers of the former amongst whom the goods are distributed in clothing, although the illegality of the original act was known to each of the above persons, at the time he contracted. I understand the rule as now clearly settled, to be, that where the contract grows immediately out of, and is connected with, an illegal or immoral

principal, where the transactions are founded in illegality; but he may also, by his own gross negligence or fraud or misconduct in his

act, a court of justice will not lend its aid to enforce it. And if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be, in fact, a new contract, it is equally tainted by it. The case before supposed, of an action for the value of goods illegally imported for another, or freight and expenses attending, founded upon a promise, express or implied, exemplifies a part of the above rule. The latter part of it may be explained by the following case. As, if the importation was the result of a scheme to consign the goods to the friend of the owner, with the privity of the former, that he might protect and defend them for the owner in case they should be brought into jeopardy, I should consider a bond or promise afterwards given by the owner to his friend, to indemnify him for his advances on account of any proceedings against the property or otherwise, to constitute a part of the *res gestæ*, or of the original transaction, though it purports to be a new contract. For it would clearly be a promise growing immediately out of, and connected with, the illegal transaction. It would be, in fact, all one transaction; and the party to whom the promise was made, would, by such a contrivance, contribute, in effect, to the success of the illegal measure. But, if the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act. Thus, if A. should, during war, contrive a plan for importing goods from the country of the enemy on his own account, by means of smuggling, or of a collusive capture, and in the same vessel should be sent goods for B.; and A. should, upon the request of B., become surety for payment of the duties, or should undertake to become answerable for expenses on account of a prosecution for the illegal importation, or should advance money to B., to enable him to pay those expenses; these acts constituting no part of the original scheme, here would be a new contract, upon a valid and legal consideration, unconnected with the original act, although remotely caused by it; and such contract would not be so contaminated by the turpitude of the offensive act, as to turn A. out of the court, when seeking to enforce it, although the illegal introduction of the goods into the country, was the consequence of the scheme projected by A. in relation to his own goods." On a writ of error, the Supreme Court held, that there was no error in this ruling of the court below. Mr. Chief Justice Marshall, in delivering the opinion of the court, commented on the leading authorities and principles; and especially on the charge of the court below. After quoting the opinion, he said: "If this opinion be contrary to law, the judgment ought to be reversed. The opinion is, that a new contract, founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful. This general proposition is illustrated by particular examples, and will be best understood by considering the examples themselves. The case supposed is, that A., during a war, contrives a plan for importing goods on his own account, from the country of the enemy, and that goods are sent to B., by the same vessel. A., at the request of B., becomes surety for the payment of the duties which accrue on the goods of B., and is compelled to pay them; can he maintain an action on the promise of B. to return this money? The opinion is, that such an action may be sus-

agency, be excluded from all remedy against his principal, even for his advances and disbursements made in the course of legal transac-

tained. The case does not suppose A. to be concerned, or in any manner instrumental in promoting the illegal importation of B.; but to have been merely engaged himself in a similar illegal transaction, and to have devised the plan for himself, which B. afterwards adopted. This illustration explains what was meant by the general words previously used, which, unexplained, would have been exceptionable. The contract made with the government for the payment of duties, is a substantive, independent contract, entirely distinct from the unlawful importation. The consideration is not infected with the vice of the importation. If the amount of duties be paid by A. for B., it is the payment of a debt due in good faith from B. to the government; and, if it may not constitute the consideration of a promise to repay it, the reason must be, that two persons, who are separately engaged in an unlawful trade, can make no contract with each other; at any rate, no contract which, in any manner, respects the goods unlawfully imported by either of them. This would be to connect distinct and independent transactions with each other, and to infuse into one, which was perfectly fair and legal in itself, the contaminating matter which infected the other. This would introduce extensive mischief into the ordinary affairs and transactions of life, not compensated by any one accompanying advantage. The same principle, diversified in form, is illustrated by another example. If A. should become answerable for expenses on account of a prosecution for the illegal importation, or should advance money to B., to enable him to pay those expenses, these acts, the court thought, would constitute a new contract, the consideration of which would be sufficient to maintain an action. It cannot be questioned, that, however strongly the laws may denounce the crime of importing goods from the enemy in time of war, the act of defending a prosecution instituted in consequence of such illegal importation, is perfectly lawful. Money advanced, then, by a friend, in such a case, is advanced for a lawful purpose, and a promise to repay it is made on a lawful consideration. The criminal importation constitutes no part of this consideration. It is laid down with great clearness, that, if the importation was the result of a scheme between the plaintiff and defendant, or if the plaintiff had any interest in the goods, or if they were consigned to him with his privity, that he might protect and defend them for the owner, a bond or promise given to repay any advances made in pursuance of such understanding or agreement, would be utterly void. The questions, whether the plaintiff had any interest in the goods of the defendant, or was the contriver of, or concerned in, a scheme to introduce them, or consented to become the consignee of the defendant's goods, with a view to their introduction, were left to the jury. The point of law decided is, that a subsequent independent contract, founded on a new consideration, is not contaminated by the illegal importation, although such illegal importation was known to Toler when the contract was made, provided he was not interested in the goods, and had no previous concern in their importation." The recent authorities, since this case was decided, have not entirely cleared the subject of all difficulty. The distinction between the cases in which a recovery can be had, and the cases in which a recovery cannot be had, of money connected with illegal transactions, which seems now best supported, is this: that, wherever the party seeking to recover is obliged to make out his case by showing the illegal contract

tions. Thus, for example, if an agent should be guilty of gross negligence, either in selling the goods of his principal to persons who are notoriously insolvent, or in omitting to sell them at the proper time contrary to his orders, whereby they are totally lost to his principal, he will not be entitled to recover from his principal any advances or disbursements, made by him on the same goods.[1] So, if he should purchase and pay for goods on account of his principal, and by his gross negligence or disobedience of orders, the goods are not forwarded to the principal at the proper time, but are afterwards destroyed by fire, or other accident, in their transit, before they reach the principal, the agent will not be entitled to recover for the money so paid for the goods.[2] Where the loss does not go to the totality of the claim, the principal will still be entitled to be indemnified, *pro tanto*, to the extent of the loss, by recouping or deducting the amount from the sum due to the agent for his advances and disbursements.[3]

§ 349. It follows, from what has been already stated, that, if an agent incurs expenses, or makes disbursements, after his authority is revoked, and he has notice of the revocation, he cannot make his principal liable therefor. A revocation may be by the act of the party or by operation of law.[4] The former requires no explanation in this place. The latter may arise in various ways. Thus, for example, it may arise, where the principal becomes a bankrupt, and is thereby rendered incapable of acting any further in the disposi-

or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original illegal contract or transaction, there he is not entitled to recover any advances made by him, connected with that contract. But, when the advances have been made upon a new contract, remotely connected with the original illegal contract or transaction, but the title of the party to recover is not dependent upon that contract, but his case may be proved without reference to it, there he is entitled to recover. Mr. Evans, in his edition of Pothier on Obligations, Vol. 2, App'x No. 1, pp. 1–19, has examined this whole subject with great diligence and ability. His conclusion is, that money advanced to pay the debt of another, due upon an illegal transaction, may be recovered by the party lending it, from the party for whom it is advanced, if the lender was not a party to the original transaction, or it was not a part of the original scheme; although, at the time of the advance, he knew of the illegality.

[1] Dodge *v.* Tileston, 12 Pick. 328, 332. See also Savage *v.* Birckhead, 20 Pick. 167; [Godman *v.* Meixsel, 65 Ind. 32].

[2] Williams *v.* Littlefield, 12 Wend. 362.

[3] Dodge *v.* Tileston, 12 Pick. 328, 332.

[4] 3 Chitty on Com. & Manuf. 223, 224; Post, §§ 468–469, 480–496.

tion of the property, or other subject-matter of the agency.[1] In such a case, all payments and advances made by an agent, after notice of the bankruptcy of his principal, on account of such property, or other subject-matter, will be treated as made by the agent in his own wrong, so far as the assignees are concerned, and will be disallowed accordingly.[2] So, also, in the case of the death of the principal, the agency determines by mere operation of law, and similar consequences will follow.[3] But upon this subject we shall have occasion to speak more fully hereafter.[4]

§ 350. In respect to the personal remedies, by which the various rights of the agent may be enforced, the consideration thereof properly belongs to a treatise upon actions, or other remedial processes. It may, however, be generally stated, that an agent may insist upon deducting all his advances, expenses, disbursements, and losses, arising in the course of his agency, whenever they are definite and certain, and do not merely sound in damages, from the pecuniary funds in his hands belonging to his principal, by way of recouper, discount, or set-off; or, where no such funds exist, he may maintain an action at law, or a bill in equity, as the case may require, for the recovery thereof.[5] Where an agent is a factor in a foreign country, and purchases goods on his own credit for his principal, and ships them to the latter, he is deemed, as between himself and his principal, to be in the same predicament, and entitled to the same rights and remedies, as any common vendor and consignor of the goods; and, consequently, he has the right of stoppage *in transitu*, in case the principal fails, or becomes insolvent, before the transit of the goods is ended by delivery thereof to the principal.[6] The case here

[1] Post, §§ 408, 482, 483.

[2] Vernon *v.* Hankey, 2 T. R. 113; Copeland *v.* Stein, 8 T. R. 204; Hankey *v.* Vernon, 3 Bro. Ch. 314; Post, § 402. Perhaps an exception may properly exist as to expenses incurred from necessity to preserve the property, while it remains in the possession of the agent.

[3] Post, §§ 448, 490, 496; 3 Chitty on Com. & Manuf. 223.

[4] Post, §§ 462–500.

[5] 2 Liverm. on Agency, 34 (ed. 1818); Dale *v.* Sollett, 4 Burr. 2133; Green *v.* Farmer, 4 Burr. 2220, 2221; Dinwiddie *v.* Bailey, 6 Ves. 142; Ante, § 344; Post, § 385.

[6] Frieze *v.* Wray, 3 East, 93; D'Aquila *v.* Lambert, Ambler, 400; Snee *v.* Prescott, 1 Atk. 245; s. c. 6 East, 28, note; Sifkin *v.* Wray, 6 East, 371; Abbott on Shipp. Pt. 3, ch. 9, § 5, p. 369 (Amer. ed. 1829); Ante, §§ 268, 290; Post, §§ 400, 423, 448. [An agent has the right of stoppage *in transitu* when he has made himself liable for the price of goods consigned to him by his principal by obtaining them in his own name or on his own credit. Hawkes *v.* Dunn,

supposed is where the shipment is made for and consigned to the principal for his account and risk. The same principle applies, *a fortiori*, to the case, where the consignment is made to the order of the factor; for then he is deemed still to retain the constructive possession of the goods, and consequently he has not only the right of stoppage *in transitu*, but also the right of lien for his general balances, like that of factor retaining the actual possession of the goods.[1]

1 Crom. & J. 519, and his right will not be defeated by a claim of a common carrier for a lien against the consignee, Oppenheim *v.* Russell, 3 B. & P. 42: or by the pledge of the bill of lading, *Re* Westzinthus, 5 B. & Ad. 817: or by a mere sale of the goods by the consignee, Miles *v.* Gorton, 2 Cr. & M. 504; Dixon *v.* Yates, 5 B. & Ad. 313: but the agent has no such right, if he is indebted to his principal at the time of the consignment on a general balance of account to a greater amount than the value of the goods, Wiseman *v.* Vandeputt, 2 Vern. 203; Vertue *v.* Jewell, 4 Camp. 31: and it may be defeated by the goods arriving in actual or constructive possession of the consignee, as, for instance, on board of a lighter belonging to the defendant, Jackson *v.* Nichol, 5 Bing. N. C. 508: or upon consignee's ship, Schotmaus *v.* Lancashire, &c. R. R. Co. L. R. 2 Ch. 332: though they are carried at the risk of the consignee, Van Casteel *v.* Booker, 2 Ex. 691; Wilmshurst *v.* Bowker, 7 M. & G. 882: so, when the goods had been taken possession of by the assignees of consignee, Scott *v.* Pettit, 3 B. & P. 469: or where the carrier before the arrival of the goods agrees to hold them as the consignee's agent, Whitehead *v.* Anderson, 9 M. & W. 518: or where the bill of lading has been assigned to a *bonâ fide* holder, Rodger *v.* Comptoir, &c. of Paris, L. R. 2 P. C. 393. See Cumming, *v.* Brown, 9 East, 506; Tanner *v.* Scovell, 14 M. & W. 28; Loeschman *v.* Williams, 4 Camp. 181. — Ed.]

[1] Sweet *v.* Pym, 1 East, 4; Post, §§ 351–390.

CHAPTER XIV.

RIGHT OF LIEN OF AGENTS.

§ 351. INDEPENDENT of the personal remedies, already alluded to, by agents against their principals, for the payment of their commissions, advances, disbursements, and responsibilities, in the course of their agency, there is an established right, which, in many cases, becomes more important and effectual than any other means of remedial redress, that is to say, the right of lien of agents. To the consideration thereof we shall now proceed.

§ 352. A lien has been defined to be a right in one man to retain that which is in his possession belonging to another, until certain demands of him, the person in possession, are satisfied.[1] It is a qualified right, therefore, which may be exercised over the property of another person; and it is founded in natural justice, and the general convenience of commerce and business.[2] It is sometimes said, that, in strictness of law, it is not either a *jus in re* or a *jus ad rem*, that is to say, it is not a right of property in the thing itself, or a right of action to the thing itself.[3] These descriptions are sufficiently clear to represent the general character of liens. But there are liens, which properly constitute, not merely a right to retain the possession of a thing, but also a right or charge upon the thing itself. Such is the lien of a vendor upon the real estate sold, for the purchase-money; and that of a bottomry bond-holder upon the ship, for the money lent.[4] And, so far from a lien being a mere right to retain the possession of a thing, it is in many cases wholly discon-

[1] Per Grose, J., in Hammond *v.* Barclay, 2 East, 227; Gladstone *v.* Birley, 2 Meriv. 404; 2 Kent, Comm. Lect. 41, p. 634 (4th ed.); Holland's Assignees *v.* Humble's Assignees, 1 Starkie, 143.

[2] Per Buller, J., in Lickbarrow *v.* Mason, 6 East, 21, n.; Kirkman *v.* Shawcross, 6 T. R. 19; 2 Kent, Comm. Lect. 41, p. 634 (4th ed.); Green *v.* Farmer, 4 Burr. 2221.

[3] Brace *v.* Duchess of Marlborough, 2 P. Will. 491; Gilman *v.* Brown, 1 Mason, 221; 1 Story on Eq. Jurisp. § 206; 2 Story on Eq. Jurisp. § 1215.

[4] 2 Story on Eq. Jurisp. §§ 1215–1217.

nected from the possession; as is the case of the lien of a vendor, as above stated, for the purchase-money; and that of a bottomry bond-holder, for the money due to him, and also that of mariners on the ship and freight, for their wages.[1]

§ 353. The lien of agents, however, generally (although not universally) falls within the common definition above alluded to, of a mere right to retain a thing, of which the party has possession, until some charge upon it is paid or removed.[2] In this respect, it is like the lien or right of retainer of common carriers, wharfingers, shipwrights, blacksmiths, and other artificers; and probably was derived from the same general principle of the common law, which gives to a man who has the lawful possession of a thing, and has expended his money or labor upon it at the request of the owner, a right to retain it until his demand is satisfied.[3]

§ 354. Liens are also divisible into two sorts, particular and general. A particular lien is usually defined to be the right to retain a thing for some charge or claim growing out of, or connected with, that identical thing; such as for labor or services or expenses bestowed upon that identical thing.[4] Of this nature are the common liens already alluded to, of agents, carriers, and artificers, for their labor, or for money expended upon the thing intrusted to them for particular purposes. These liens are generally favored at the common law, as resting on natural equity, and the general convenience of trade and commerce.[5] A general lien is a right to retain a thing,

[1] 1 Story on Eq. Jurisp. § 506; 2 Story on Eq. Jurisp. §§ 1216, 1217.

[2] 2 Kent, Comm. Lect. 41, p. 634 (4th ed.); Montagu on Liens, 1; Wilson *v.* Balfour, 2 Camp. 579; *Ex parte* Heywood, 2 Rose, 357; Smith on Merc. Law, 336 (2d ed.); Id. 514, 515 (3d ed. 1843).

[3] 2 Kent, Comm. Lect. 41, pp. 634, 635 (4th ed.); Scarfe *v.* Morgan, 4 Mees. & Wels. 270, 283.

[4] 3 Chitty on Com. & Manuf. 537; 2 Kent, Comm. Lect. 41, p. 634 (4th ed.); Smith on Merc. Law, 337 (2d ed.); Id. B. 4, ch. 2, p. 510 (3d ed. 1843); Houghton *v.* Mathews, 3 Bos. & Pull. 485, 494; Bevans *v.* Waters, 3 Carr. & Payne, 520; Scarfe *v.* Morgan, 4 Mees. & Wels. 270, 283; 2 Bell, Comm. § 773 (4th ed.); Id. pp. 90, 91 (5th ed.).

[5] Ibid.; *Ex parte* Deeze, 1 Atk. 228; Green *v.* Farmer, 4 Burr. 2221; Scarfe *v.* Morgan, 4 Mees. & Wels. 270, 283; Chase *v* Westmore, 5 M. & Selw. 180. In Scarfe *v.* Morgan, 4 Mees. & Wels. 283, Mr. Baron Parke, in delivering the opinion of the court, said: "The principle seems to be well laid down in Bevan *v.* Waters, 1 Mood. & Malk. 235; s. c. 3 Carr. & Payne, 520, by Lord Chief Justice Best, that where a bailee has expended his labor and skill in the improvement of a chattel delivered to him, he has a lien for his charge in this respect. Thus, the artificer, to whom the goods are delivered for the purpose of being worked into form; or the farrier, by whose skill the animal is cured

not only for charges and claims specifically arising out of, or connected with, that identical thing, but also for a general balance of accounts between the parties, in respect to other dealings of the like nature.[1] It is less favored, and is construed somewhat more strictly, by courts of law, than a particular lien; although, certainly, the tendency of late years, in the commercial community, has been rather to expand than to restrict the cases, in which it is to be implied by the usage of trade.[2]

§ 355. In regard to particular liens, they may arise in various ways. First, by an express contract; secondly, by an implied contract, resulting from the usage of trade, or the manner of dealing between the parties; or, thirdly, by mere operation of law, from the legal relation and acts of the parties, independently of any contract.[3] The last is generally deemed the true source of the particular lien of salvors, innkeepers, common carriers, farriers, blacksmiths, tailors, shipwrights, and other artisans.[4] But general liens not being (as we have seen[5]) favored in the law, they must be maintained upon some one of the two former grounds; that is to say, upon the ground of an express contract, or that of an implied contract, resulting from the usage of trade, or from the previous dealings between the parties.[6]

of a disease; or the horse-breaker, by whose skill he is rendered manageable, have liens on the chattels in respect of their charges. And all such specific liens, being consistent with the principles of natural equity, are favored by the law, which is construed liberally in such cases."

[1] 3 Chitty on Com. & Manuf. 537; 2 Kent, Comm. Lect. 41, p. 634 (4th ed.); Smith on Merc. Law, 337 (2d ed.); Id. B. 4, ch. 2, p. 510 (3d ed. 1843); 2 Bell, Comm. § 773 (4th ed.); Id. pp. 90, 91, 105 (5th ed.).

[2] Ibid.; Montagu on Liens, 1, and cases there cited; Houghton *v.* Mathews, 3 Bos. & Pull. 485; Rushforth *v.* Hadfield, 7 East, 228; Holderness *v.* Collinson, 7 B. & Cressw. 212; 3 Chitty on Com. & Manuf. 544; Gladstone *v.* Birley, 2 Meriv. 404; Williams *v.* Littlefield, 12 Wend. 362; Smith on Merc. Law, B. 4, ch. 2, pp. 511–516 (3d ed. 1843).

[3] 3 Chitty on Com. & Manuf. 538, 539; Green *v.* Farmer, 4 Burr. 2221; Montagu on Liens, Pt. 2, ch. 1, 2, pp. 26–40; Scarfe *v.* Morgan, 4 Mees. & Wels. 270; 2 Bell, Comm. § 773 (4th ed.); Id. pp. 90, 91 (5th ed.).

[4] 3 Chitty on Com. & Manuf. 538–540, 543; Green *v.* Farmer, 4 Burr. 2221; Smith on Merc. Law, 336–339 (2d ed.); Id. B. 4, ch. 2, § 2, pp. 511–516 (3d ed. 1843); 2 Kent, Comm. Lect. 41, pp. 634–636 (4th ed.); Story on Bailm. § 440; Blake *v.* Nicholson, 3 M. & Selw. 167; Chase *v.* Westmore, 5 M. & Selw. 180.

[5] Ante, § 354.

[6] 3 Chitty on Com. & Manuf. 544, 546, 547; 2 Kent, Comm. Lect. 41, p. 636 (4th ed.); Gladstone *v.* Birley, 2 Meriv. 404; Jarvis *v.* Rogers, 15 Mass. 389, 394, 396; Post, § 375.

§ 356. Indeed, it might perhaps, in strict propriety of language, be said, that all liens arise by operation of law; and that, where they arise by a contract, express or implied, they are more properly pledges or hypothecations than liens. It was upon one occasion said, by a learned judge, that "The right of lien does not arise out of any contract whatsoever, but out of a right to hold property till the party claiming the lien has been paid for the operation he performs."[1] And, upon another occasion, another learned judge used expressions still more direct, saying: "Lien, in its proper sense, is a right which the law gives. But it is usual to speak of lien by contract, though that is now in the nature of an agreement for a pledge. Taken either way, however, the question always is, whether there be a right to detain the goods till a given demand shall be satisfied. That right must be derived from law or contract."[2] Whatever may be the critical force of these remarks, the indiscriminate use of the word lien, as applicable to the right in cases arising from contract, as well as in cases arising by operation of law, is now become so universal, that it would be a vain refinement to attempt to recall or to perpetuate any distinction between them.[3]

§ 356 *a*. The Roman law derived its own liens, whether they were pledges or hypothecations or simple privileges from similar sources. They might arise from a contract, either express or implied, or they might arise by mere operation of law. They might be express. "Contrahitur hypotheca per pactum conventum; cum quis paciscatur, ut res ejus propter aliquam obligationem sint hypothecæ nomine obligatæ. Nec ad rem pertinet, quibus fit verbis. Sicuti est et in his obligationibus, quæ consensu contrahuntur."[4] They might be implied, or arise by tacit consent. "Pignori esse credantur; quasi id tacite convenerit."[5] They might arise by mere operation of law, as in the case of repairs by artificers. "Qui in

[1] By Lord Chief Justice Gibbs, in Wilson *v.* Heather, 5 Taunt. 642, 645.

[2] Sir Wm. Grant, in Gladstone *v.* Birley, 2 Meriv. 404.

[3] In Scarfe *v.* Morgan, 4 Mees. & Wels. 278, Mr. Baron Alderson said: "A lien may be created by contract, and it may arise out of an express contract, or a contract by the custom of trade." See also Cowell *v.* Simpson, 16 Ves. 275; Chase *v.* Westmore, 5 M. & Selw. 180; Jarvis *v.* Rogers, 15 Mass. 389, 394; Smith *v.* Plummer, 1 B. & Ald. 575, by Bayley, J.; 2 Bell, Comm. § 793 (4th ed.); Id. pp. 90, 91, 97 (5th ed.); Smith on Merc. Law, B. 4, ch. 2, § 2, pp. 511–516 (3d ed. 1843).

[4] Dig. Lib. 20, tit. 1, l. 4; 1 Domat, B. 3, tit. 1, § 2, art. 5.

[5] Dig. Lib. 20, tit. 2, l. 4; 1 Domat, B. 3, tit. 1, § 2, art. 5.

navem exstruendam vel instruendam credidit, vel etiam emendam, privilegium habet."[1]

§ 357. Particular liens were fully recognized and enforced in the Roman law, wherever money or labor or services had been expended on account of the property demanded.[2] In that law they were well known under the denomination of privileges, and, in many instances, they gave a right of priority of satisfaction, even over claims which were antecedent in point of time. "Privilegia non ex tempore æstimantur, sed ex causâ; et, si ejusdem tituli fuerunt, concurrunt, licet diversitates temporis in his fuerint.[3] Interdum posterior potior est priori; utputa, si in rem istam conservandam impensum est, quod sequens credidit."[4] Thus, persons advancing their money to improve the property, shipwrights, architects, undertakers, workmen, artificers, and carriers, were entitled to a lien or privilege on the property. "Creditor, qui ob restitutionem ædificiorum crediderit, in pecuniâ, quæ credita erit, privilegium exigendi habebit.[5] Qui in navem exstruendam, vel instruendam credidit, vel etiam emendam privilegium habet.[6] Item, si quis in merces sibi obligatas crediderit, vel ut salvæ fiant, vel, ut naulum exsolvatur, potentior erit, licet posterior sit. Nam et ipsum naulum potentius est. Tantundem dicetur, et si merces horreorum, vel areæ, vel vecturæ jumentorum debetur. Nam et hic potentior erit."[7] A factor was entitled to a similar privilege for his advances and disbursements to preserve the property, for the plain reason, that he thereby insured the preservation of the property. "Hujus enim pecunia salvam fecit totius pignoris causam."[8] The same rule was applied to the depositaries, mandataries, and other agents; and the property might be retained in the nature of a pledge. "Quasi pignus retinere potest eam rem."[9] Indeed, the civil law went much further than our law upon this subject; for it gave a particular lien or privilege to persons who

[1] Dig. Lib. 42, tit. 5, l. 26; 1 Domat, B. 3, tit. 1, § 5, art. 5.

[2] 2 Story, Eq. Jurisp. §§ 1221–1223.

[3] Dig. Lib. 42, tit. 5, l. 32; 1 Domat, B. 3, tit. 1, § 5, art 1.

[4] Dig. Lib. 20, tit. 4, l. 5; 1 Domat, B. 3, tit. 1, § 5, art. 2, 3.

[5] Dig. Lib. 42, tit. 5, l. 24, § 1; 1 Domat, B. 3, tit. 1, § 5, art. 6.

[6] Dig. Lib. 42, tit. 5, l. 26; 1 Domat, B. 3, tit. 1, § 5, art. 5–11; Ante, § 356.

[7] Dig. Lib. 20, tit. 4, l. 6, §§ 1, 2; 1 Domat, B. 3, tit. 1, § 5, art. 11.

[8] Dig. Lib. 20, tit. 4, l. 6, Introd.

[9] Pothier on Oblig. n. 589, by Evans (in the French editions, F. 625); 1 Domat, B. 3, tit. 1, § 5, art. 8; Story on Bailm. §§ 121, 197, 357, 358; Ayliffe's Pand. B. 4, tit. 17, pp. 521, 522; Pothier de Dépot, n. 59; Pothier, Traité de Mandat. notes 69, 78, 79; Cod. Lib. 4, tit. 35, l. 4; Ante, § 356.

advanced their moneys to others for the improvement, repair, purchase, or building of houses, ships, and other things.[1] In many cases, too, the civil law made the lien equivalent to a pledge, or what is sometimes called a tacit mortgage.[2]

§ 358. General liens do not seem to have been distinctly recognized in the Roman law, although it is highly probable that they would be enforced, as in the nature of a pledge, in cases of express contracts for the purpose.[3] In some cases, indeed, the party might avail himself of the defence by way of set-off, or compensation, as it was called in the Roman law, on account of a general balance of accounts. But this was rather a right resulting from a general doctrine of law, in respect to the extinguishment of mutual claims of the same nature, such as mutual debts, than a distinct right to retain the thing itself for such balance.[4] Pothier points out the very distinction, in the case of a deposit. "The depositary cannot indeed, oppose to the restitution of the deposit a compensation of the credits which he has against the person who intrusted him with it, when these credits arise upon other accounts. But, when the credit arises from the deposit itself, as for the expenses which he has been obliged to incur for the preservation of it, there is a right of compensation, not only in the case of an irregular deposit, but also with respect to the deposit of a specific thing, which may be retained, *quasi quodam jure pignoris*, until the credit is discharged."[5]

§ 359. Having thus considered the nature of liens, particular as well as general, it may be proper to say a few words: (1.) In relation to the manner and circumstances under which they are acquired. (2.) To what claims they properly attach. (3.) How they may be waived or lost; and (4.) In what manner they are to be enforced or taken advantage of.

§ 360. First. As to the manner and circumstances under which a lien may be acquired. To create a valid lien, it is essential, that the party through whom or by whom it is acquired, should himself

[1] Domat, B. 3, tit. 1, § 5, art. 5–8; Dig. Lib. 42, tit. 5, l. 26, 34; Cod. Lib. 1, tit. 8, l. 7; Id. tit. 14, l. 17.

[2] 1 Domat, B. 3, tit. 2, § 2, art. 5; Dig. Lib. 20, tit. 1, l. 4; Id. tit. 2, l. 4.

[3] Ante, §§ 356, 357.

[4] 2 Bell, Comm. 772, 773 (4th ed.); Id. pp. 90, 91 (5th ed.).

[5] Pothier on Oblig. n. 589, by Evans (in the French editions, No. 625); 2 Bell, Comm. §§ 772, 773; Id. pp. 90, 91 (5th ed.). In the Scottish law, the doctrine of lien is known by the name of Retention; and that of set-off by the name of Compensation. 2 Bell, Comm. § 772 (4th ed.); Id. pp. 90, 91 (5th ed.); Id. 105, 106.

either have the true and just ownership of the property, or, at least, a right to vest it. If therefore he is not the true owner of the property; or if he has no rightful power to dispose of the same, or to create a lien; or if he exceeds his authority; or if he is a mere wrong-doer; or if his possession is tortious; in these and the like cases, it is obvious, that he cannot ordinarily create a lien, or confer it on others.[1] If the rule were otherwise, it would enable the party to give to others what he did not himself possess, which would violate the general maxim (which has but few exceptions), that he who has no title himself, cannot transfer a title to another: "Nemo plus juris ad alium transferre potest, quam ipse haberet."[2] It would be easy to multiply illustrations of this doctrine. But a single one may suffice, which has been already mentioned, that a factor cannot pledge the goods of his principal, so as to create a lien on them, for advances made to himself.[3] *A fortiori*, a person cannot acquire a lien to himself, founded upon his own illegal or wrongful act, or upon his own misconduct or breach of duty or fraud.[4]

§ 361. In the next place, to found a valid lien, there must be an actual or constructive possession of the thing by the party asserting it, with the express or implied assent of the party against whom it is asserted.[5] This follows, as a natural consequence, from what has been already said; for a lien is a right to retain a thing, which presupposes a lawful possession, which can arise only from a just

[1] 2 Bell, Comm. § 774 (4th ed.); Id. 90, 92 (5th ed.); 3 Chitty on Com. & Manuf. 547, 548; Hiscox *v.* Greenwood, 4 Esp. 174; Burn *v.* Brown, 2 Starkie, 272; Madden *v.* Kempster, 1 Camp. 12; Lanyon *v.* Blanchard, 2 Camp. 597; Jackson *v.* Clark, 1 Y. & Jerv. 216; 2 Kent, Comm. Lect. 41, pp. 638, 639 (4th ed.); Lempriere *v.* Pasley, 2 T. R. 485; McCombie *v.* Davies, 7 East, 5; Maanss *v.* Henderson, 1 East, 335; Ogle *v.* Atkinson, 5 Taunt. 763; Montagu on Lien, Pt. 4, ch. 4, p. 68; Smith on Merc. Law, B. 4, ch. 2, pp. 511–516 (3d ed. 1843).

[2] Dig. Lib. 50, tit. 17, l. 54; Pothier, de Vente, n. 7; Ante, § 113, and note.

[3] Ante, § 113; Doubigny *v.* Duval, 5 T. R. 604; Story on Bailm. §§ 325, 326; 3 Chitty on Com. & Manuf. 204, 205, 547; Jackson *v.* Clarke, 1 Y. & Jerv. 216; McCombie *v.* Davies, 7 East, 5; Smith on Merc. Law, 342 (2d ed.); Id. B. 1, ch. 5, § 4, pp. 511, 512 (3d ed. 1843); Jarvis *v.* Rogers, 15 Mass. 389, 394–396.

[4] 3 Chitty on Com. & Manuf. 547, 548; Burn *v.* Brown, 2 Starkie, 272; Smith on Merc. Law, 342 (2d ed.); Id. B. 1, ch. 5, § 4, pp. 511, 512 (ed. 1843); Lucas *v.* Dorrien, 7 Taunt. 278; Taylor *v.* Robinson, 2 Moore, 730; Lempriere *v.* Palsey, 2 T. R. 487. [See Pearce *v.* Roberts, 27 Mo. 179.]

[5] 3 Chitty on Com. & Manuf. 547, 549, 550; Montagu on Lien, Pt. 1, ch. 1, pp. 4, 5; 2 Bell, Comm. § 774 (4th ed.); Id. pp. 91–97 (5th ed.); Rice *v.* Austin, 17 Mass. 197.

possession under the owner or other party against whom the claim exists.[1] The possession, indeed, need not be the actual possession of the party himself; for it is sufficient, if the possession be by his servants or agents in the proper discharge of their duty.[2] Neither need the possession always be direct and actual. It is sufficient, if it be constructive, and operative in a point of law. Thus, where property is at sea, the delivery and indorsement of the bill of lading will confer a constructive possession, sufficient to create a lien.[3] So, the delivery of choses in action, or other documents or muniments of title, will in many cases, give a good lien upon the property represented, or intended to be conveyed thereby.[4] Thus, the delivery of a bill of sale of a ship at sea will be a constructive possession, sufficient to sustain a lien, if the ship is taken possession of within a reasonable time after her return.[5] So, the delivery of a policy of insurance will give a lien thereon; as will the delivery of a promissory note, to collect and receive the amount.[6] Still, however, the rule is strictly adhered to that there must be a possession, actual or constructive.[7] If, therefore, the thing has not yet arrived to the possession of the party, but is still *in transitu*, or if he has only a right of possession, the lien does not attach thereon.[8]

[1] Heywood *v.* Waring, 4 Camp. 291; Hallet *v.* Barsfield, 18 Ves. 188; Legg *v.* Evans, 6 Mees. & Wels. 41, 42; Winter *v.* Coit, 3 Seld. 288.

[2] 3 Chitty on Com. & Manuf. 547, 549; 2 Kent, Comm. Lect. 41, p. 639 (4th ed.); McCombie *v.* Davies, 7 East, 5; 2 Bell, Comm. § 744 (4th ed.); Id. pp. 91–97 (5th ed.); Gainsford *v.* Detillet, 13 Martin, 284; Clemson *v.* Davidson, 5 Binn. 392. [Thus, where an agent has advanced money or incurred a liability upon the faith of the solvency of his principal, and the latter becomes insolvent while the proceeds and fruit of such advances are in the possession of the agent or *within his reach*, he has a lien upon them before they come into the possession of his principal. Muller *v.* Pondir, 55 N. Y. 325. — Ed.]

[3] Rice *v.* Austin, 17 Mass. 197; 2 Bell, Comm. pp. 91–97 (5th ed.). [And see Davis *v.* Bradley, 28 Vt. 118.]

[4] 3 Chitty on Com. & Manuf. 550; Brown *v.* Heathcote, 1 Atk. 160; Lempriere *v.* Pasley, 2 T. R. 485, 491; Lucas *v.* Dorrien, 7 Taunt. 279; Haile *v.* Smith, 1 Bos. & Pull. 563.

[5] Mair *v.* Glennie, 4 M. & Selw. 240; Robinson *v.* McDonnell, 2 B. & Ald. 134; Abbott on Shipp. Pt. 1, ch. 1, §§ 4–10 (Amer. ed. 1829).

[6] Montagu on Lien, Pt. 1, ch. 1, p. 19.

[7] 2 Bell, Comm. § 774 (4th ed.); Id. pp. 91–97 (5th ed.).

[8] 3 Chitty on Com. & Manuf. 549; Kinlock *v.* Kraig, 3 T. R. 119; Id. 783; 2 Kent, Comm. Lect. 41, p. 638 (4th ed.); Sweet *v.* Pym, 1 East, 4; Holland's Assignees *v.* Humble's Assignees, 1 Starkie, 143; Hervey *v.* Liddard, 1 Starkie, 123; Montagu on Lien, Pt. 1, ch. 1, pp. 5, 6; 2 Bell, Comm. § 774 (4th ed.); Id. pp. 91–97 (5th ed.). See Anderson *v.* Clarke, 2 Bing. 20; Bryan *v.* Nix, 4 Mees. & Wels. 775, 792. [Where cotton had been shipped to factors, and

§ 362. In the next place, no right of lien can arise, where, from the nature of the contract between the parties, it would be inconsistent with the express terms or the clear intent of the contract.[1] Thus, for example, if the goods are deposited in the possession of the party for a particular purpose, inconsistent with the notion of a lien, as, for example, to hold them, or their proceeds, subject to the order of a third person, or to have them transported to another place, or to have them delivered to another person, no lien will attach thereon.[2] So, if the money, for which the lien is asserted, is not due, but is payable at some future time, and in the intermediate time the goods are to be redelivered to the owner, no lien will attach thereon; for, in such a case, the lien will be inconsistent with such intermediate redelivery.[3] So, no lien will arise, where there is an express agreement between the parties not to insist upon it; or, where it is clear, from the whole transaction, that the party trusted exclusively to the personal credit of his debtor,[4] or to another distinct fund.[5]

upon its arrival the bills of lading were in the factors' possession, but before they got actual possession of the cotton it was attached, it was held that the bill of lading was not actual or constructive possession of the cotton, and that the factors had no lien. Saunders *v.* Bartlett, 12 Heisk. 316; Oliver *v.* Moore, 12 Heisk. 482; Chaffraix *v.* Harper, 26 La. An. 22. But where cotton was delivered by a debtor to an agent of a factor, and placed upon his drays to be transported to his warehouse, the factor's lien at once attached, and was held to be superior to the lien of an attachment levied upon the cotton while on the drays. Burrus *v.* Kyle, 56 Ga. 24. — Ed.]

[1] Chase *v.* Westmore, 5 M. & Selw. 180; Jarvis *v.* Rogers, 15 Mass. 389, 395–397; Smith on Merc. Law, B. 4, ch. 2, § 2, pp. 511–513 (3d ed. 1843). See Pinnock *v.* Harris, 3 Mees. & Wels. 532; Jackson *v.* Cummins, 5 Mees. & Wels. 350, 351.

[2] 3 Chitty on Com. & Manuf. 549, 550; Walker *v.* Birch, 6 T. R. 258; Jarvis *v.* Rogers, 15 Mass. 389, 395, 396; Weymouth *v.* Boyer, 1 Ves. jr. 416; Smith on Merc. Law, 337, 338 (2d ed.); Id. pp. 511–513 (3d ed. 1843).

[3] 3 Chitty on Com. and Manuf. 548; Crawshay *v.* Homfray, 4 B. & Ald. 50; Scarfe *v.* Morgan, 4 Mees. & Wels. 270, 284; Judson *v.* Etheridge, 1 Cromp. & Mees. 743; Chase *v.* Westmore, 5 M. & Selw. 180; Williams *v.* Littlefield, 12 Wend. 362, 370.

[4] See Pinnock *v.* Harrison, 3 Mees. & Wels. 532; Ante, § 342; Post, §§ 366–385.

[5] 2 Kent, Comm. Lect. 41, pp. 638, 639 (4th ed.); Cowell *v.* Simpson, 16 Ves. 275; Bailey *v.* Adams, 14 Wend. 201; Gilman *v.* Brown, 1 Mason, 191; Jackson *v.* Cummins, 5 Mees. & Wels. 350, 351; Sanderson *v.* Bell, 2 Cromp. & Mees. 304. In Mr. Metcalf's edition of Yelverton's Rep. 67 *a*, note (1), there is a full statement of the doctrines on this subject. See also 5 Edw. 4, 2, pl. 20; 17 Edw. 4, 1; Davis *v.* Bowsher, 5 T. R. 491; Jarvis *v.* Rogers, 15 Mass. 389, 394–396. We are carefully to distinguish between cases of this sort, where

§ 362 *a*. It sometimes becomes a matter of very nice consideration, whether a particular agreement amounts to an original waiver of, or dispensation from, the right of lien, which otherwise might by law attach itself to the particular transaction. Thus, it was formerly thought that, where work was done, or services performed, under an express contract, for a specific stipulated sum, there all right of lien was by implication abandoned.[1] But that doctrine has been since overturned; and the reasonable doctrine established, that the mere existence of a special agreement will not exclude the right of lien; but the terms of it must be such as actually or necessarily are inconsistent with such right.[2]

§ 363. This doctrine is entirely coincident with that of the Roman law, which, in cases of sales, gave a lien for the purchase-money on the thing sold, unless personal credit was given to the buyer. "Quod vendidi, non aliter fit accipientis, quam si aut pretium nobis solutum sit, aut satis eo nomine factum, vel etiam fidem habuerimus emptori sine ullâ satisfactione."[3]

§ 364. Secondly. Let us now proceed to the second head of inquiry; what are the debts or claims to which liens properly attach? In general, it may be stated, that they attach only to certain and liquidated demands; and not to those which sound only in damages, and can be ascertained only through the intervention of a jury.[4] A special contract, may, indeed, exist by which a lien will be created in cases of this latter sort; as, for example, where there is an express contract to hold goods for an indemnity against future contin-

the lien to be asserted is created by mere operation of law, and is excluded by the agreement of the parties, and another class of cases, where the right of set-off is asserted in a suit; for, in the latter cases, the right of set-off (as, for example, in a case of bankruptcy) would not be taken away by any agreement not to insist upon a lien, or set-off, for a balance of accounts, in regard to goods received by the party for sale, and actually sold under such an agreement, for which the party is sued. The ground of this distinction seems to be, that the general right of set-off, in a suit at law, being secured by statute, cannot be taken away by implication from any such agreement. McGillivray *v.* Simpson, 2 Carr. & Payne, 320; s. c. 9 Dowl. & Ryl. 35. See Cornforth *v.* Rivett, 2 M. & Selw. 510; Eland *v.* Carr, 1 East, 375; Mayer *v.* Nias, 1 Bing. 311.

[1] Brennan *v.* Currint, Sayer, 224; Bull. Nisi Prius, 45; Smith on Merc. Law, B. 4, ch. 2, § 2, pp. 513, 514 (3d ed. 1843).

[2] Chase *v.* Westmore, 5 M. & Selw. 180; Hutton *v.* Brag, 7 Taunt. 25; Smith on Merc. Law, B. 4, ch. 2, § 2, pp. 512, 514 (3d ed. 1843); Peyroux *v.* Howard, 7 Peters, 324.

[3] Dig. Lib. 18, tit. 1, l. 19; Owenson *v.* Morse, 7 T. R. 64.

[4] 3 Chitty on Com. & Manuf. 548, 549.

gent claims, or damages.[1] But the law will not imply a lien for such unliquidated and contingent demands; but the lien, if asserted, must be made out by clear proofs. It may be added, that, generally, the same rules are adopted, in respect to the nature of the claims and demands, for which a lien may be asserted, as regulate the rights of the parties, and allowances, in matters of account; that is to say, they must be legal or equitable claims or demands founded upon a just and moral consideration, and due to the party as a matter of right, and not as a matter of mere favor.[2]

§ 365. In the next place, the debt or demand, for which the lien is asserted, must be due to the party, claiming it in his own right, and not merely as the agent of a third person.[3] It must, also, be a debt or demand due from the very person for whose benefit the party is acting, and not from a third person, although the goods may be claimed through him.[4] So, the debt or demand, if claimed for a general balance of accounts, must be a balance, arising from transactions of a similar nature with that upon which the particular lien arises. As, for example, if the particular lien is for factorage, the general lien must also be for factorage transactions, and cannot be applied to transactions of a totally dissimilar nature, such as for rent, or for other debts due to the factor, before that relation existed between him and his principal.[5] Of course, these remarks apply only to cases, where there is no special agreement between the

[1] 3 Chitty on Com. & Manuf. 548, 549; Drinkwater *v.* Goodwin, Cowp. 251.

[2] Curtis *v.* Barclay, 5 B. & Cressw. 141. [In the case of involuntary deposits, as in the case of a finding of lost property, deposits of property made by winds or floods, and property left by an outgoing tenant, the person in whose possession they are is entitled to a reasonable compensation for his care and expense in their keeping and preservation, though he has no lien upon the property therefor. Preston *v.* Neale, 12 Gray (Mass.), 222. In the case of lost property, if the loser offer a certain sum as a reward to him who will restore the property, a lien is thereby created to the extent of the reward so offered. Wentworth *v.* Day, 3 Met. 352; Wilson *v.* Guyton, 8 Gill, 213; Cummings *v.* Gann, 52 Penn. St. 484. — G.]

[3] Houghton *v.* Mathews, 3 Bos. & Pull. 485; 3 Chitty on Com. & Manuf. 552, 553; Montagu on Lien, Pt. 1, ch. 1, pp. 8, 10; *Ex parte* Shank, 1 Atk. 234.

[4] Weymouth *v.* Boyer, 1 Ves. jr. 416; Jackson *v.* Clark, 1 Y. & Jerv. 216; Foster *v.* Hoyt, 2 Johns. Cas. 327; Maanss *v.* Henderson, 1 East, 335.

[5] Houghton *v.* Mathews, 3 Bos. & Pull. 485; Smith on Merc. Law, 340 (2d ed.); Id. pp. 512, 513 (3d ed. 1843); 2 Kent, Comm. Lect. 41, p. 638 (4th ed.); Montagu on Lien, Pt. 2, ch. 1, § 2, pp. 33, 34; Walker *v.* Birch, 6 T. R. 258, per Lawrence, J.; Jarvis *v.* Rogers, 15 Mass. 389, 396.

parties, varying the rule; for such an agreement will always constitute the true expositor of the rights of the parties.

§ 366. Thirdly. How a lien may be waived or lost. In the first place, it may be waived by any act or agreement between the parties, by which it is surrendered, or it becomes inapplicable.[1] As, for example, if, while the property is in the hands of the party, with a lien attached to it, he agrees to hold the property exclusively for, or as the property of, a third person, that will amount to an implied waiver of his lien. So, the same result will take place, if he expressly agrees that it shall no longer be subject to the lien; or if he agrees to take another security in lieu of the lien.[2]

§ 367. In the next place, the voluntary parting with the possession of the goods will amount to a waiver or surrender of a lien; for, as it is a right founded upon possession, it must ordinarily cease when the possession ceases.[3] In such cases, it matters not, whether the party absolutely parts with the possession, rightfully or wrongfully; or whether it is with the assent of the owner; or whether it is by his own tortious conversion of the property, or by some other unauthorized act. Thus, if an agent should make a shipment of goods, consigned to the order of his principal (it would be different, if it were to his own order),[4] it would destroy the lien of the agent on those goods equally, whether the shipment were by the orders of the principal or in violation of his orders; for, in such a case, the transfer of the property would be complete and absolute.[5] But it might be different in a case, where the transfer was merely qualified, and not absolute; for, if such transfer were rightful, then the lien would not be lost. But, if it were wrongful, then it would be lost. Thus, for example, an agent who has a lien on property, may lawfully transfer and pledge the same to another person as a security, to the extent of the amount due to himself, and for which he has the lien, if he apprises such person, at the time of the lien, that he is to hold

[1] Piesch *v.* Dickson, 1 Mason, Cir. 9.

[2] Montagu on Lien, Pt. 3, ch. 1, pp. 40–48; 2 Bell, Comm. § 776 (4th ed.); Id. pp. 96, 97 (5th ed.); 3 Chitty on Com. & Manuf. 556, 557; Ante, 362; [Story *v.* Flournoy, 55 Ga. 56].

[3] 2 Kent, Comm. Lect. 41, p. 639 (4th ed.); Kruger *v.* Wilcox, cited 1 Burr. 494; 3 Chitty on Comm. & Manuf, 549, 550, 554, 555; Sweet *v.* Pym, 1 East, 4; Daubigny *v.* Duval, 5 T. R. 604; Owenson *v.* Morse, 7 T. R. 64; Kruger *v.* Wilcox, Ambler, 254; 2 Bell, Comm. § 774 (4th ed.); Id. pp. 91–97 (5th ed.).

[4] Ante, § 361; 3 Chitty on Com. & Manuf. 555.

[5] 3 Chitty on Com. & Manuf. 549, 550, 554, 555; Sweet *v.* Pym, 1 East, 4; Abbott on Shipp. Pt. 3, ch. 9, § 7, p. 373 (ed. 1829).

the property solely for the lien and no more; for that being a rightful exercise of his authority, it amounts to a mere appointment of the party to keep possession as his servant, and the lien is not thereby extinguished; for the possession still continues properly to be the possession of the agent.[1] On the other hand, if an agent should tortiously pledge the property of his principal generally for advances made to himself, by that very act his own lien upon the property would be gone, notwithstanding the possession of the pledgee might, in some sense, be treated as his own possession; for the change of possession would be tortious, and be deemed a waiver, or extinguishment of his lien.[2] So, if a person having a lien on goods, should cause them to be taken in execution at his own suit, he would lose his lien thereby, although he should become the purchaser of them at the execution sale, and they never were removed from his premises; for the sheriff took possession under the execution with his consent, and his possession, as purchaser, is a new and subsequent possession.[3]

§ 368. Such is the general rule as to possession. But there are certain cases, which constitute exceptions to the application of the rule, and in which, in favor of trade and the apparent intention of the parties, the lien is preserved, although the possession of the property is parted with. Thus, for example, a factor who, by lawful authority, sells the goods of his principal, and parts with the possession under the sale, is not deemed to lose his lien thereby; but it attaches to the proceeds of the sale in the hands of the vendee, and also to the securities therefor in the hands of the factor, in lieu of the original property.[4] This exception is grounded upon the manifest inconvenience which would otherwise attend all factorage transactions; for a factor would rarely sell, except for ready money, if thereby he should lose his lien; and yet a sale on credit would be,

[1] 3 Chitty on Com. & Manuf. 551, 555; Montagu on Lien, B. 1, Pt. 4, ch. 4, p. 74; McCombie *v.* Davies, 7 East, 7; Man *v.* Shifner, 2 East, 529; Gainsford *v.* Duillet, 13 Martin, 284; 2 Kent, Comm. Lect. 41, p. 639 (4th ed.); Thompson *v.* Farmer, 1 Mood. & Malk. 48; Urquhart *v.* McIver, 4 Johns. 103; Jarvis *v.* Rogers, 15 Mass. 389, 408; Clemson *v.* Davidson, 5 Binn. 392.

[2] McCombie *v.* Davies, 7 East, 7; Ante, §§ 78, 113, and notes Ibid.; Shipley *v.* Kymer, 1 M. & Selw. 484; Solly *v.* Rathbone, 2 M. & Selw. 298; Martini *v.* Coles, 1 M. & Selw. 140; Boyston *v.* Coles, 6 M. & Selw. 14; Cockran *v.* Irlam, 2 M. & Selw. 301.

[3] Jacobs *v.* Latour, 5 Bing. 130. See Campbell *v.* Proctor, 6 Greenl. 12.

[4] Drinkwater *v.* Goodwin, Cowp. 251; Houghton *v.* Mathews, 3 Bos. & Pull. 489; 3 Chitty on Com. & Manuf. 550, 551, 555, 556; Montagu on Lien, Pt. 1, ch. 1, p. 10; 2 Bell, Comm. § 774 (3), (4th ed.); Id. pp. 115–117 (5th ed.).

or might be, incomparably more beneficial for his principal. Hence, the law presumes, that the parties tacitly agree, that the securities and proceeds shall stand charged with the original lien; and this tacit understanding is now universally in coincidence with the usage of trade.[1] Indeed, a factor is deemed, for many purposes, as the owner of the property, especially when he has demands upon it for advances and debts.[2] Cases of a similar nature may occur, where there is an express agreement between the parties, that the lien shall not be lost by a transfer of the possession; for, in all such cases, the rule of law is, "Conventio vincet legem."[3]

§ 369. Another exception is, where the possession has not been voluntarily parted with, but has been taken from the party by fraud, or force, or mistake; for, in such a case, it would be against the first principles of justice to allow the lien to be divested.[4] Another exception (as we have just seen) is, where the party parts with the possession, *sub modo*, only, as upon a pledge of his own lien as security to a third person.[5] And another exception, of course, is of maritime liens, and other special liens, already alluded to.[6]

§ 370. It may be added, under this head, that although a lien is lost by parting with the possession, yet it may revive and reattach upon the property coming again into the possession of the party entitled to the lien, if it so comes as the property of the same owner against whom his right exists, and no new intermediate equities have affected it.[7] This, at least, is true, in regard to a general

[1] Ibid.

[2] Drinkwater *v.* Goodwin, Cowp. 251; Houghton *v.* Mathews, 3 Bos. & Pull. 485. [But the property cannot be seized on execution, or attached as the property of the agent, even though he has the possession and right to sell it in his own name, where he is obliged to account to his principal for the proceeds. Loomis *v.* Barker, 69 Ill. 360. — Ed.]

[3] 3 Chitty on Com. & Manuf. 550, 556; Dodsley *v.* Varley, 12 Adolph. & Ellis, 632. [Thus, where it was stipulated in a written contract for the sale of land, that the vendee should cut the timber into railroad ties, upon which the vendor should have a lien for the purchase-money, and the vendee sold the ties to the agent of a railroad company, with full notice of the lien, it was held that the company bought the ties subject to the right of lien of the vendor. Slater *v.* Irwin, 38 Iowa, 261. — Ed.]

[4] 3 Chitty on Com. & Manuf. 556; Montagu on Lien, Pt. 1, ch. 1, p. 11; Pierson *v.* Dunlop, Cowp. 571; Wallace *v.* Woodgate, Ryan & Mood. 193; s. c. 1 Carr. & Payne, 575.

[5] Ante, § 367.

[6] Ante, § 352.

[7] 3 Chitty on Com. & Manuf. 557, 558; Whitehead *v.* Vaughan, Cook's Banking Laws, 579; Spring *v.* South Carolina Ins. Co. 8 Wheat. 268, 285,

lien; for, in such a case, it will attach upon fresh goods which have for the first time come to hand; and there is no reason why it should not equally attach to the old property coming back again. How far the same principle will apply to a specific or particular lien does not seem to be settled; although the intimations in judicial opinions are against it.[1]

§ 371. Fourthly. In what manner a lien may be enforced and taken advantage of. In respect to the rights conferred upon a party by a lien, it may be stated that they are generally of a very limited nature. As a lien is, ordinarily, nothing more than a right of retainer of the property, the party entitled to the lien cannot ordinarily sell or dispose of the property, in order to satisfy his lien, unless with the consent of the owner, either express or implied, from the nature and objects of the very transaction. Thus, for example, if goods are consigned to a factor for sale, and he makes advances upon them, he is, of course, invested with a right to sell them, and may out of the proceeds satisfy his lien, or use it by way of set-off.[2] Nay, in certain cases, where he has made advances as a factor, it would seem to be clear, that he may sell to repay himself for those advances, without the assent of the owner (*invito domino*), if the latter, after due notice of the intention to sell for the advances, does not repay him the amount.[3] But, except in a few and

286; 2 Bell, Comm. p. 117 (5th ed.); [Perkins *v.* Boardman, 14 Gray (Mass.), 481].

[1] Hartley *v.* Hitchcok, 1 Starkie, 408; Jones *v.* Pearl, 1 Strange, 556; Bosanquet *v.* Dudman, 1 Starkie, 1; Montagu on Lien, Pt. 1, ch. 1, pp. 19, 20; 2 Bell, Comm. § 774, (4) (4th ed.); Id. pp. 116, 117 (5th ed.).

[2] 3 Chitty on Com. & Manuf. 551; Pothonier *v.* Dawson, Holt's N. P. 383; Zoit *v.* Millaudon, 16 Martin, 471; Montagu on Lien, Pt. 1, ch. 3, pp. 23, 24; 2 Kent, Comm. Lect. 41, p. 642 (4th ed.); 2 Bell, Comm. p. 117 (5th ed.).

[3] This point was expressly decided in the Supreme Court of Massachusetts, in the case of Parker *v.* Brancker, 22 Pick. 40. See also 3 Chitty on Com. & Manuf. 551. In Pothonier *v.* Dawson, Holt's N. P. 383, Lord Chief Justice Gibbs said: "Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But when goods are deposited, by way of security, to indemnify a party against a loan of money, it is more than a pledge. The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade. These goods were deposited to secure a loan. It may be inferred, therefore, that the contract was this: 'If I (the borrower) repay the money, you must redeliver the goods; but if I fail to repay it, you may use the security I have left to repay yourself.' I think, therefore, the defendant had a right to sell." See Zoit *v.* Millaudon, 16 Martin, 470; 3 Kent, Comm. Lect. 41, 642 (4th ed.); Rice *v.* Austin, 17 Mass. 197. [And where merchandise is consigned to a commission-merchant who makes advances on them, the legal presumption is that he is clothed with the right to sell the goods in the

limited cases of this sort, the right of the holder of the lien seems to be confined to the mere right of retainer, which may be used as a defence to any action for the recovery of the property brought against him, or, as a matter of title or special property, to reclaim the property by action, if he has been unlawfully dispossessed of it.[1] In many cases, however, where the lien itself does not confer a right of sale, a court of equity will decree it, as a part of its own system of remedial justice;[2] and courts of admiralty are constantly in the habit of decreeing a sale, to satisfy maritime liens, such as bottomry bonds, seamen's wages, repairs of foreign ships, salvage, and other claims of a kindred nature.[3]

§ 372. But it seems, that even a lien or right of retainer is not, or may not be deemed, under all circumstances, an unqualified right, at least, as against the owner; for it has been said, that, although an agent has a lien upon the property of his principal for any advances or balance due him, yet he has not a right to retain more of the property, when demanded by the principal, than is sufficient to secure and satisfy his lien; and, as to the residue, he is bound to obey the orders of the principal.[4] This is a point, how-

exercise of sound discretion, and to reimburse himself for his advances; and where the consignor declines to advance sufficient money upon the goods to guarantee the consignee against loss, the latter may sell them at once to protect himself. Howard *v.* Smith, 56 Mo. 314. So, with stocks held on a margin, if the parties are familiar with the usage of business to that effect. Colket *v.* Ellis, 10 Phil. 375; Smith *v.* Lindo, 5 C. B. 587; Pidgeon *v.* Burslem, 3 Exch. 465; Hornsby *v.* Fielding, 10 Heisk. 367; Moeller *v.* McLagan, 60 Ill. 317; Kraft *v.* Fancher, 44 Md. 204; Rice *v.* Montgomery, 4 Biss. 75; Blair *v.* Childs, 10 Heisk. 199; Howland *v.* Davis, 40 Mich. 545. In England, it has been decided that a factor has no right to sell the goods contrary to the orders of his principal, even though the latter has refused to repay the factor's advances. Smart *v.* Sandars, 5 C. B. 895. And in some cases in this country the rule has been limited to cases where, if the factor sold under his principal's orders, his own security would be impaired. Weed *v.* Adams, 37 Conn. 378; Field *v.* Farrington, 10 Wall. 141. — ED.]

[1] 3 Chitty on Com. & Manuf. 551; The Ship Packet, 3 Mason, 334; Greene *v.* Farmer, 4 Burr. 2218; Scott *v.* Franklin, 15 East, 428. [One who has a lien upon a chattel cannot, if he keep it for the purpose of enforcing payment, add to his lien upon the chattel a charge for its keeping; since the keeping is for his own benefit, rather than for the benefit of the owner of the chattel. British Empire Shipping Co. *v.* Somes, E., B. & E. 353; Somes *v.* British Empire Shipping Co., 8 H. L. Cas. 338. — G.]

[2] 2 Kent, Comm. Lect. 41, p. 642 (4th ed.); 1 Story on Eq. Jurisp. § 506; 2 Story on Eq. Jurisp. §§ 1216, 1217.

[3] Abbott on Shipp. Pt. 3, ch. 10, § 2, and note to American edition, 1829; Id. Pt. 2, ch. 2, §§ 10–17, and notes; Id. §§ 17, 27–29; Id. Pt. 4, ch. 4, § 1.

[4] Jolly *v.* Blanchard, 1 Wash. Cir. 252, 255.

ever, which is manifestly open to question, since the lien extends over the whole property, as a tacit pledge; and the agent does not seem any more bound to part with any of it, until his claim is satisfied, than a pledgee would be bound in the case of an express pledge.[1] But, be this as it may, it is certain that the owner has a perfect right to dispose of the property, subject to the lien, as he may please; and the party to whom he conveys it, will have a perfect title to it, upon discharging the lien.[2] It may be added, that a lien is a personal privilege of the party himself, who is entitled to it, and cannot be set up by any third person against the principal, either as a defence or as a cause of action.[3]

§ 373. Having disposed of these general considerations in regard to liens, all of which do or may apply to liens created by agency, let us now proceed to the more immediate object of these commentaries, and inquire what liens belong to agents in general, and what belong to particular classes of agents. The former may be disposed of in a very few words; for, in cases of agency, there generally exists a particular right of lien in the agent for all his commissions, expenditures, advances, and services in and about the property or thing intrusted to his agency, whenever they were proper or necessary or incident thereto. This is strictly true in all cases of mere private agency, unless there is some private agreement, express or implied, or some usage of trade or business, which repels or excludes the lien.[4] Thus, for example, attorneys, bankers, brokers, factors, carriers, packers, dyers, shipwrights, wharfingers, commission merchants, auctioneers, supercargoes, and masters of ships have all a lien on the papers, documents, goods, merchandise, and other property committed to their care in the course of their agency, for the sums due to them for their commissions, disbursements, advances, and services in and about the same.[5]

[1] See Davis *v.* Bowcher, 5 T. R. 488.

[2] The Ship Packet, 3 Mason, 334; Walter *v.* Ross, 2 Wash. Cir. 283.

[3] Holly *v.* Huggeford, 8 Pick. 73.

[4] 3 Chitty on Com. & Manuf. 537–540; Smith on Merc. Law, 337 (2d ed.); Id. B. 4, ch. 2, § 2, p. 515 (3d ed. 1843); Montagu on Lien, Pt. 2, ch. 1, pp. 26–36; ch. 2, pp. 36–38; 2 Bell, Comm. §§ 777, 779, 781, 782 (4th ed.); Id. pp. 114–118 (5th ed.).

[5] Montagu on Lien, Pt. 2, ch. 1, pp. 26–30; 3 Chitty on Com. & Manuf. 538–542, 589; 2 Kent, Comm. Lect. 41, p. 640 (4th ed.); Abbott on Shipp. Pt. 3, ch. 1, § 7; Id. ch. 3, § 11. [It has been held that brokers do not possess the right of general lien; but where a firm imported a cargo of sugar which was sold by a broker through whose hands the proceeds of the sale passed, the latter

§ 374. Factors and agents for the purchase of goods have also a lien on the goods, when purchased, for the moneys paid and liabilities incurred by them in respect to such purchase; and, unless the usage of trade or the particular agreement or course of dealing between the parties, varies this right, they are not bound to part with the possession of the goods, or to deliver them, or to ship them, subject to the absolute control of the principal, until they are reimbursed or secured for such advances and liabilities.[1]

§ 375. Particular liens, then, belonging to all classes of agents, let us, in the next place, inquire, to what classes of agents general liens appropriately appertain. From what has been already said, it is clear, that all general liens have their origin in the positive or implied agreement of the parties.[2] Some of them, however, have now, by the general usage of trade, become so fixed and invariable, that no proof whatsoever is required to establish their existence; but courts of justice take notice of them, as a matter of course. Others, again, are so variable and uncertain, or are so much affected by local usages, that in all cases of controversy they are required to be established by competent proofs, before they are admitted.[3] In practice, however, except for this purpose, the distinction between general liens by the usage of trade, and those arising from positive or special agreement, is little attended to; and therefore it need not be insisted on in this place.[4] Let us, then, proceed to examine some of the more common cases in which these general liens exist.

§ 376. And, first, in relation to factors. It is now incontrovertibly established, as a matter of law derived from long usage, and admitted without proofs, that factors have a general lien upon every

was held to have a lien upon the money for his brokerage in making the sale, though he could not retain the amount of his entire claim against the owners. Barry *v.* Boninger, 46 Md. 59. And the *bona fide* holder of a draft against goods shipped, with the bill of lading assigned, has been held to have a lien upon the goods in the hands of the consignee, and he can recover from him the proceeds of the sale, even though the consignor is indebted to the consignee on general account. Lee *v.* Bowen, 5 Biss. 154. And see Hunt *v.* Haskell, 24 Me. 339. — Ed.]

[1] Stevens *v.* Robins, 12 Mass. 180. See Williams *v.* Littlefield, 12 Wend. 362, 370; 2 Bell, Comm. §§ 775, 799 (4th ed.); Id. pp. 105–111 (5th ed.); Holbrook *v.* Wright, 24 Wend. 169; [Knapp *v.* Alvord, 10 Paige, 205].

[2] Ante, §§ 354, 355.

[3] 3 Chitty on Com. & Manuf. 544–546; 2 Bell, Comm. §§ 789–806 (4th ed.); Id. pp. 105–124 (5th ed.); [Thomason *v.* Poullain, 54 Ga. 306; Richardson *v.* Dinkgrave, 26 La. An. 651; Gunn *v.* Pattishal, 48 Ga. 405].

[4] Ante, §§ 354–356.

portion of the goods of their principal in their possession, and upon the price of such as are lawfully sold by them, and the securities given therefor, for the general balance of the accounts between them and their principal, as well as for the charges and disbursements arising upon those particular goods.[1] The lien may also extend to all sums for which a factor has become liable, as a surety or otherwise, for his principal, wherever the suretyship has resulted from the nature of the agency, or it has been undertaken upon the footing of such a lien.[2] But it does not extend to other independent debts contracted before, and without reference to, the agency.[3]

§ 377. The general lien of a factor will attach, not only to goods which have actually come into the factor's possession in the lifetime of the principal, but also to goods which, at the death of the principal, are *in transitu* to the factor, and afterwards come to his hands, where he has advanced money, or accepted bills on account of them, to the extent of such advances or acceptances, and the incidental charges of the consignment.[4] If goods come to the possession of the factor after a secret act of bankruptcy, committed by the principal, the factor will not be entitled to retain the goods

[1] 2 Kent, Comm. Lect. 41, p. 640 (4th ed.); 3 Chitty on Com. & Manuf. 544–546; Smith on Merc. Law, 338, 339 (2d ed.); Id. B. 4, ch. 2, § 2, p. 515 (3d ed. 1843); Kruger *v.* Wilcox, Ambler, 252; Hudson *v.* Granger, 5 B. & Ald. 22, 31, 32; Godin *v.* London Assur. Co. 1 W. Bl. 104; s. c. 1 Burr. 489; Jarvis *v.* Rogers, 15 Mass. 389, 396; Peisch *v.* Dickson, 1 Mason, 9; Burrill *v.* Phillips, 1 Gall. 360; 2 Bell, Comm. §§ 799, 800 (4th ed.); Id. pp. 114–118 (5th ed.); [Francklyn *v.* Sprague, 17 N. Y. Sup. 589].

[2] Drinkwater *v.* Goodwin, Cowp. 251. Foxcroft *v.* Devonshire, 2 Burr. 931; Hammond *v.* Barclay, 2 East, 227; [Hidden *v.* Waldo, 55 N. Y. 294].

[3] Drinkwater *v.* Goodwin, Cowp. 251; Houghton *v.* Mathews, 3 Bos. & Pull. 485; Stevens *v.* Robins, 12 Mass. 182; Smith on Merc. Law, 339, 340; Olive *v.* Smith, 5 Taunt. 56; Ante, § 365. [But where the defendants claimed that they retained the proceeds of the property of their principal in the exercise of a factor's lien to satisfy a prior indebtedness alleged to be due them by him, it was held that the factor not only could not establish his claim to such a lien, but the attempt to set it up when the factor knew that his principal was on the eve of bankruptcy, and thus secure a preference over the other creditors, was a fraud under the Bankrupt Act. Nudd *v.* Burrows, 91 U. S. 426. — Ed.]

[4] Hammond *v.* Barclay, 2 East, 227; 2 Bell, Comm. §§ 800, 801 (4th ed.); Id. pp. 114–118 (5th ed.). [And commission merchants who have made advances on goods of their principal which they had had insured, and which were destroyed by fire without any fault of the factors, have the same lien upon the insurance money, when collected from the Insurance Company, which they would have had upon the goods if they had not been destroyed. Johnson *v.* Campbell, 120 Mass. 449. And see Brown *v.* Coombs, 63 N. Y. 598; Burrus *v.* Kyle, 56 Ga. 24; Chaffraix *v.* Harper, 26 La. An. 22; Daniel *v.* Swift, 54 Ga. 113. — Ed.]

against the assignees, for advances or acceptances, made after such act of bankruptcy, upon the faith of the consignment of the goods to him, although such act was unknown to him at the time of the advances or acceptances; for the act of bankruptcy devests the property out of the bankrupt.[1] Whether the like effect would be produced where the act of bankruptcy was committed after the advances or acceptances were made, and while the goods were *in transitu* to the factor, is a point upon which doubts have been entertained; but the weight of judicial opinions seems against the lien.[2]

§ 378. This general lien. given to factors, has been established upon its manifest tendency to aid the interests of trade and commerce, and to promote confidence and a liberal spirit on the part of factors in respect to advances to their principals. It is deemed to exist in all cases, until the contrary presumption is clearly established. But, if such a presumption is clearly established, and, *a fortiori*, if an express agreement repelling it is proved, then the lien of the factor fails, as every other lien does, when it contravenes the intention of the parties.[3] It was formerly thought, that this lien of a factor was dissolved by the death of the principal, and that it could not be asserted against the specialty creditors of the deceased.[4] But this doctrine has no just foundation in principle, and it has long since been deemed utterly unsupportable.[5]

§ 379. Secondly. In relation to insurance brokers. This class of agents, also. have now, by general usage, a lien upon the policies of insurance in their hands, procured by them for their principals, as also upon the moneys received by them upon such policies, not only for the amount of their commissions and the premiums for the particular policies, but also for the balance of their general insurance account with their employers.[6] But the lien does not extend to

[1] Copeland *v.* Stein, 8 T. R. 199.

[2] Nichols *v.* Clent, 3 Price, 547. But see Foxcroft *v.* Devonshire, 2 Burr. 931; Kinlock *v.* Craig, 3 T. R. 119, 783; Lempriere *v.* Pasley, 2 T. R. 485; Hammond *v.* Barclay, 2 East, 227; Montagu on Lien, B. 1, Pt. 4, ch. 4, p. 79; Rice *v.* Austin, 17 Mass. 197; 2 Bell, Comm. § 800 (4th ed.); Id. pp. 114–118 (5th ed).

[3] Ante, § 362; Walker *v.* Birch, 6 T. R. 258; Mabar *v.* Massias, 2 W. Bl. 1072; Weymouth *v.* Boyer, 1 Ves. jr. 416.

[4] Chapman *v.* Darby, 2 Vern. 117.

[5] Montagu on Lien, B. 1, Pt. 4, ch. 4, pp. 77–80. See Lempriere *v.* Pasley, 2 T. R. 485, 490, 491.

[6] 3 Chitty on Com. & Manuf. 546; Castling *v.* Aubert, 2 East, 325, 330, 331; Man *v.* Shiffner, 2 East, 523; Hovil *v.* Pack, 7 East, 164; Cranston *v.*

cover any balance due upon business foreign to that of effecting policies of insurance, as the usage does not extend to such a claim;[1] although, in many cases, it may be made available by way of set-off, and, in cases of bankruptcy, by way of mutual debt and mutual credit.[2] The lien, also, for a general balance, extends to cases where the insurance broker procures a policy for, and in the name of, another, who acts as agent for a third person, where the agency is unknown to the broker; for, in such a case, the broker has a right to treat with the agent as if he were the principal, and his rights are not controllable by such secret agency.[3] But where it is known to the broker, that the party acts for another, there his lien is strictly confined to the commissions and premium and charges on that very policy.[4]

§ 380. Thirdly. In relation to bankers. Bankers, in like manner, have a general lien upon all notes, bills, and other securities, deposited with them by their customers, for the balance due to them on general account.[5] Indeed, they may properly be considered as holders for value of notes and bills and other securities, indorsed in blank, and deposited with them, for all advances and for all acceptances, past and future, made by them, for a customer, which exceeds its cash balance.[6] And, under such circumstances

The Philad. Insur. Co. 5 Binn. 538; Smith on Merc. Law, 339, 340 (2d ed.); Id. B. 4, ch. 2, § 2, p. 516 (3d ed. 1843); Spring *v.* So. Car. Insurance Co. 8 Wheat. 268, 285; Moody *v.* Webster, 3 Pick. 424; 2 Bell, Comm. § 804 (4th ed.); Id. pp. 114–118 (5th ed).

[1] Olive *v.* Smith, 5 Taunt. 56; 2 Bell, Comm. § 804 (4th ed.); Id. pp. 120–123 (5th ed.); Ante, § 365.

[2] Olive *v.* Smith, 5 Taunt. 56; Parker *v.* Carter, Cooke, Bank. Law, 567 (5th ed.); 2 Bell, Comm. §§ 807, 812 (4th ed.); Id. pp. 120–123 (5th ed.); Ante, § 370.

[3] Mann *v.* Forrester, 4 Camp. 60; Westwood *v.* Bell, 4 Camp. 349; Foster *v.* Hoyt, 2 John. Cas. 327; Maans *v.* Henderson, 1 East, 335.

[4] Ibid.; Snook *v.* Davidson, 2 Camp. 218; Man *v.* Shiffner, 2 East, 523; 2 Bell, Comm. § 804 (4th ed.); Id. pp. 120–123 (5th ed.); Swift *v.* Tyson, 16 Peters, 1, 21, 22; Bank of the Metropolis *v.* The New-England Bank, 17 Peters, 174; s. c. 1 Howard, Sup. Ct. 234.

[5] Davis *v.* Bowsher, 5 T. R. 488; Bolton *v.* Puller, 1 Bos. & Pull. 546; Giles *v.* Perkins, 9 East, 14; Bolland *v.* Bygrave, 1 Ryan & Mood. 271; Jourdaine *v.* Lefevre, 1 Esp. 66; Smith on Merc. Law, 338, 339 (2d ed.); Id. pp. 514, 515 (3d ed. 1843); 2 Bell, Comm. § 803 (4th ed.); Id. pp. 118–120 (5th ed).

[6] Bosanquet *v.* Dudman, 1 Stark. 1; Scott *v.* Franklin, 15 East, 428; *Ex parte* Bloxam, 8 Ves. 531; Heywood *v.* Watson, 4 Bing. 496; Bramah *v.* Roberts, 1 Bing. N. C. 469; Percival *v.* Frampton, 2 Cromp., Mees. & Rosc. 180; Swift *v.* Tyson, 16 Pet. 1, 21, 22.

they may sue upon such securities, and recover thereon, at least to the amount of the balance due to them.[1]

§ 381. But here, as in other cases of lien, the right to retain for the general balance of accounts may be controlled by any special agreement, which shows that it was not intended by the parties; as it may also be repelled by circumstances showing that the securities did not come into the hands of the banker, or were not held by him in the ordinary course of business.[2] Thus, for example, if securities have been deposited with a banker, as a pledge for a specific sum, and not as a pledge generally, that will repel the inference, that they were intended to give a lien for the general account or balance between the parties.[3] So, a banker will not have a lien for his general balance of account on muniments or securities casually left at his banking house, after he has refused to advance money on them as a security.[4]

§ 382. Fourthly. In regard to common carriers. They have a lien, not only for the freight and charges of carrying the particular goods, but sometimes also for the general balance of accounts due to them. This general lien seems to have originated in special agreements and notices; but it has now become common. Still, however, it is so little favored, as a matter of public policy, that, if disputed, it must be shown to exist in the particular case, either by a general usage, or by a special agreement, or by a particular mode of dealing between the parties.[5]

[1] Ibid.; Bolland *v.* Bygrave, 1 Ryan & Mood. 271.

[2] [A banker has no lien upon securities deposited with him for safe keeping only, although the owner thereof owes him a debt upon which he has recovered judgment. Leese *v.* Martin, L. R. 17 Eq. 224; nor does the lien arise where securities are deposited with him for a special purpose. Brandas *v.* Barnett, 12 Clark & F. 787. See also Zelle *v.* German Sav. Institution, 4 Mo. App. 401. And where A., in order to secure the payment of his note to B., pledged to him certain shares of the capital stock of a national bank, and default having been made on the note, B. sold the stock, and applied to the cashier of the bank to transfer the stock, and the cashier refused to make the transfer, and claimed a lien on the stock as A. was indebted to the bank, it was held that the bank had no lien on the stock. Case *v.* Bank, 100 U. S. 446. — Ed.]

[3] Vanderzee *v.* Willis, 3 Bro. Ch. 21; Smith on Merc. Law, 338, 339 (2d ed.); Id. B. 4, ch. 2, § 2, pp. 514, 515 (3d ed. 1843); 2 Bell, Comm. § 803 (4th ed.); Id. pp. 118–120 (5th ed.).

[4] Lucas *v.* Dorrien, 7 Taunt. 278; Mountfort *v.* Scott, 1 Turn. & Russ. 274; Smith on Merc. Law, 338, 339 (2d ed.); Id. B. 4, ch. 2, § 2, pp. 514, 515 (3d ed. 1843); 2 Bell, Comm. § 803 (4th ed.); Id. pp. 118–120 (5th ed.).

[5] Rushforth *v.* Hadfield, 6 East, 519; s. c. 7 East, 224; Wright *v.* Snell, 5 B. & Ald. 350; Jarvis *v.* Rogers, 15 Mass. 389, 395, 396; 2 Bell, Comm. §§ 781, 790; Id. pp. 99–102 (5th ed.).

§ 383. Fifthly. In regard to attorneys at law and solicitors in equity. They also have a general lien upon all the papers and documents of their clients in their possession, not only for all the costs and charges due to them in the particular cause in which the papers and documents come to their possession, but also for the costs and charges due to them for other professional business and employment in other causes. This has long been the settled practice, and is now fully recognized as an existing general right.[1] But the lien upon papers and documents is only commensurate with the right of the client, who delivers the papers and documents to the attorney, and is not valid against third persons claiming by a distinct title.[2] Thus, for example, if a client who deposits deeds and title papers with an attorney, be only tenant for life, the lien will be good against him, but not against the remainder-man.[3] The lien of an attorney or solicitor also extends, in England, to all moneys received and judgments recovered and costs taxed for his client, subject only to any deductions which the other party may have a right to, by way of cross-costs or set-off.[4] The practice in America is probably variable,

[1] *Ex parte* Nesbitt, 2 Sch. & Lefr. 279; *Ex parte* Stirling, 16 Ves. 259; *Ex parte* Pemberton, 18 Ves. 382; Stevenson *v.* Blakelock, 1 M. & Selw. 535; Hollis *v.* Claridge, 4 Taunt. 807; Montagu on Lien, B. 1, Pt. 4, ch. 3, pp. 59–67; Smith on Merc. Law, 338, 339 (2d ed.); Id. B. 1, ch. 2, § 2, pp. 514, 515 (3d ed. 1843); 2 Bell, Comm. § 796 (4th ed.); Id. pp. 111–114 (5th ed.).

[2] Hollis *v.* Claridge, 4 Taunt. 807.

[3] *Ex parte* Nesbitt, 2 Sch. & Lefr. 279; Montagu on Lien, B. 1, Pt. 4, ch. 3, p. 61.

[4] Montagu on Lien, B. 1, Pt. 4, ch. 3, pp. 59–63. [In a recent case, *In re* Knapp, reported 24 Albany, L. J. 106, Danforth, J., says: "The general proposition that an attorney has a lien for his costs and charges upon deeds or papers, or upon moneys received by him on his client's behalf in the course of his employment, is not doubted; nor does it stand upon any questionable foundations. It comes to us *super antiquas vias*. As early as the year 1734 it was held by Lord Chancellor Talbot to arise upon a contract implied by law, and as effectual as if it resulted from an express agreement. *Ex parte* Bush, 7 Viner's Ab. 74. And in 1779, in Wilkins *v.* Carmichael, 1 Doug. 101, Lord Mansfield declared that the practice which protected it 'was established on general principles of justice, and that courts of both law and equity had carried it so far that an attorney or solicitor may obtain an order to stop his client from receiving money in a suit in which he has been employed for him till his bill is paid;' and in Welsh *v.* Hale, 1 Doug. 238, the same judge held that an attorney has a lien on the money received by his client for his bill of costs. 'If the money come to his hands he may retain the amount of his bill. He may stop it *in transitu* if he can lay hold of it. If he applies to the court they will prevent its being paid over till his demand is satisfied.' Indeed, he has inclined to go still further, and to hold that if the attorney gave notice to the defendant not to pay till his bill should be discharged, a payment by defend-

being governed by local practice, or by statutory provisions. The lien also is strictly confined to papers and documents, which come into the possession of the attorney or solicitor in the course of professional employment.[1] But, upon this class of cases, it seems

ant, after such notice, would be in his own wrong, and like paying a debt which had been assigned after notice. And Parke, B., in Barker *v.* St. Quentin, 12 M. & W. 451, refers to this decision as establishing an attorney's claim to the equitable interference of the court to have the judgment held as security for the debt to the attorney, or after notice to compel the defendant to pay its proceeds over again. In our own state this was so well settled that Kent, in his Commentaries, vol. ii., p. 641, puts it down as an established principle that the attorney has two liens for his costs, — one on the papers in his hands, and the other on the funds recovered. No new rule, therefore, was enunciated in Bowling Green Savings Bank *v.* Todd, 52 N. Y. 489, where it was said that the 'lien of the attorney . . . attaches to the money recovered or collected upon the judgment.' It is plain, then, that the right of lien exists. Its origin should not be lost sight of. The declaration in *Ex parte* Bush was restated by Chancellor Eldon, in Corvell *v.* Simpson, 1 Ves. 279, where he describes it as *prima facie*, 'a right accruing through an implied contract,' and as it exists in favor of those who have bestowed labor and service upon property in its repair, improvement, or preservation, the agreement implied must be that the person rendering it shall retain the property until compensation is made. The lien of an attorney stands on no higher ground. In *Ex parte* Yeldon, 4 ch. Div. L. R. 129, James, L. J., says: 'The things upon which they claim a lien are things upon which they have expended their own labor or their own money,' and asks, 'Why are they not to have that lien in the same way as any other workman, who is entitled to retain the things upon which he has worked, until he is paid for it?' And in like manner in a recent case of Coughlin *v.* N. Y. C. & H. R. R. R. Co., 71 N. Y. 443, the lien of the attorney upon a judgment recovered by him is upheld upon the theory that his services and skill procured it. Wherever it exists it is protected by the courts." See Lloyd *v.* Maunsell, 22 L. J. Q. B. 111; *Ex parte* Morrison, L. R. 4 Q. B. 156; Slater *v.* Mayor of Sunderland, 33 L. J. Q. B. 37. See also *In re* Cullen, 27 Beavan, 51; Georges *v.* Georges, 18 Veasey, 294; Gibson *v.* May, 4 De G. M. & G. 512; Davies *v.* Lowndes, 3 C. B. 808; Pilcher *v.* Arden, L. R. 7, Ch. D. 318; Berry *v.* Howitt, L. R. 9 Eq. 1; Gen. Share Trust Co. *v.* Chapman, L. R. 1 Com. Pl. D. 771; Twinan *v.* Poster, L. R. 11 Eq. 181; Pinkerton *v.* Easton, L. R. 16 Eq. 490; Baile *v.* Baile, L. R. 13 Eq. 497; Pritchard *v.* Roberts, L. R. 17 Eq. 222; Jones *v.* Frost, L. R. 7 Ch. 773; De Bay *v.* Griffin, L. R. 10 Ch. 291. — Ed.]

[1] Montagu on Lien, B. 1, Pt. 4, ch. 3, pp. 61, 62; Stevenson *v.* Blakelock, 1 M. & Selw. 535; 22 Pick. 210; 2 Met. 478; 4 Gray, 357. [This lien cannot be effected by any set-off of one execution against another between the same parties. Ocean Ins. Co. *v.* Rider, 22 Pick. 210. An attorney has no such lien in a cause before judgment as to prevent his client from settling the action with the opposite party. Simmons *v.* Almy, 103 Mass. 33; Quincy *v.* Francis, 5 Abb. (N. C.) 286; Wright *v.* Wright, 70 N. Y. 96; Wehle *v.* Connor, 15 Am. Law Rev. 290. He has in some cases a lien upon the real estate of his client. Perkins *v.* Perkins, 9 Heisk. 95; Brown *v.* Bigley, 3 Tenn. (Ch.) 618; McPherson *v.* Cox, 96 U. S. 404; *Contra*, Garner *v.* Garner, 1 Lea (Tenn.) 29. See also Twiggs *v.* Chambers, 56 Ga. 279; Crotty *v.* Mackenzie, 52 How. (Pr.) 54. — Ed.]

unnecessary to dwell, as agencies of this sort are not within the intended scope of these commentaries.

§ 384. Sixthly. There are other cases in which a general lien has been admitted to exist in regard to particular classes of agents; such, for example, as packers, acting as factors, calico-printers, fullers, dyers, and wharfingers.[1] But, in all cases of this sort, the general lien arises, either from the usage of the particular trade, or from a special agreement of the parties, or from the peculiar habit of dealing between them.[2] Independently of the existence of one or other of these sources of right, the law confines the parties to the particular lien on the goods themselves, incurred or due on their sole account; and the burden of proof is on those who set up a general lien, to establish it by clear and determinate evidence.[3]

§ 385. We may close this part of the subject in relation to liens by agents, by remarking, that the mere fact that an agent has a lien upon the property confided to him, either for his commissions, advances, disbursements, or expenses upon that property, or for his general balance of account, does not limit the right of the agent to that mere fund; but the principal is still liable to him personally, in a suit *in personam* for the amount of the same claims.[4] For, by the general rule of law, an agent, in such cases trusts both to the fund and to the person of his principal.[5] But this personal liability

[1] Montagu on Lien, B. 1, Pt. 2, ch. 1, § 2, pp. 31–34; 3 Chitty on Com. & Manuf. 54; Smith on Merc. Law, 338, 339 (2d ed.); Id. B. 4, ch. 2, § 2, pp. 514, 515 (3d ed. 1843); 2 Bell, Comm. § 792 (4th ed.); Id. pp. 105–110 (5th ed.); Ante, § 34.

[2] Ibid.

[3] Ibid.; Holderness *v.* Collinson, 7 B. & Cressw. 212; 2 Bell, Comm. § 792 (4th ed.); Id. pp. 105–110 (5th ed.).

[4] Ante, §§ 342, 362, 366.

[5] Burrill *v.* Phillips, 1 Gall. 360; Peisch *v.* Dickson, 1 Mason, 10; Corlies *v.* Cumming, 6 Cowen, 181; Beckwith *v.* Sibley, 11 Pick. 482; Ante, §§ 342, 362, 366. [Where a factor sells the goods of his principal for less than his advances and charges, he can recover the deficit from his principal, but he must show that he promptly and faithfully followed the instructions given him by the latter. Strong *v.* Stewart, 9 Heisk. 137. And before a factor can recover anything from his principal in such a case, he must show that the goods consigned to him are insufficient to satisfy his claim. Gihon *v.* Stanton, 9 N. Y. 476. But where a factor receives consignments of goods under an agreement by which he is to advance money from time to time to his principal, sell the goods at market price, charge a certain commission, and after selling, pay the balance to his principal, if any there be, he may, after having made large advances to his principal upon goods not sold, and which have been on hand for several months, sue the principal for the amount of the advances already made, without waiting until all the goods are sold. Dolan *v.* Thompson, 126 Mass. 183;

may be waived by an express agreement between the parties, or by a course of dealing between them which justifies the same conclusion.[1] The burden of proof of such a waiver, however, will lie upon the principal, and cannot be inferred from the mere relation of principal and factor.[2]

386. Let us, in the next place, consider what are the rights of sub-agents, in regard to their immediate employers, and also in regard to the superior or real principal. It may be generally stated, that where agents employ sub-agents in the business of the agency, the latter are clothed with precisely the same rights, and incur precisely the same obligations, and are bound to the same duties, in regard to their immediate employers, as if they were the sole and real principals. This is the general rule.[3] But it is, of course, liable to exceptions; for where, by the usage of trade, or the agreement between the parties, sub-agents are ordinarily or necessarily employed to accomplish the ends of the agency, there, if the agency is avowed, and credit is exclusively given to the principal, the intermediate agent may be exempted from all responsibility to the sub-agent.[4] But, unless such exclusive credit is given, the intermediate agent will be liable to the sub-agent, although the superior or real principal may also be liable.[5]

Upham *v.* Lefavour, 11 Met. 174. So, an agent to purchase goods for his principal, who has himself paid the money, need not resort to the goods as his only security, and, if after demand, his principal does not reimburse him, he can sue him without waiting to sell the goods. Hoy *v.* Reade, 1 Sweeny (N. Y.), 626. See, *contra*, Smart *v.* Sandars, 5 C. B. 895. — Ed.]

[1] Ibid.

[2] Burrill *v.* Phillips, 1 Gall. 360; Peisch *v.* Dickson, 1 Mason, 9; Corlies *v.* Cumming, 6 Cowen, 181; Beckwith *v.* Sibley, 11 Pick. 482; Ante, §§ 342, 362, 366.

[3] Ante, §§ 217, 289; Ersk. Inst. B. 3, tit. 3, § 49.

[4] Ante, §§ 1, 5, 201, 289. [Thus, a contract for hire made by the general agent of a company with a sub-agent, and signed by him as such general agent, makes the company liable to the sub-agent for his pay. Cotton States Life Ins. Co. *v.* Mallard, 57 Ga. 64. So, where the chief clerk of the general agent of an insurance company made a contract for repairing a house injured by fire, without the general agent's knowledge, it was held that the company was bound by the contract. Hilton *v.* Newman, 6 Mo. App. 304. But it has also been held that the fact that a principal recognized a sub-agent and accepted his services, does not necessarily prove an agreement to pay for such services. Homan *v.* Brooklyn, &c. Co., 7 Mo. App. 22. And in U. S. Life Ins. Co. *v.* Hessberg, 27 Ohio St. 393, it was held that the compensation of local agents employed by a general agent was governed by the provisions of the contract between the company and the general agent. — Ed.]

[5] Ante, §§ 14, 15, 217.

§ 387. In regard to the superior or real principal, the general rule of law is, that, if an agent employs a sub-agent, to do the whole or any part of the business of his agency, without the knowledge or consent of the principal, express or implied, there, inasmuch as no privity exists in such a case between the principal and the sub-agent, the latter will not be entitled to claim from the principal any compensation for commissions or advances or disbursements in the course of his sub-agency. But his sole remedy therefor is against his immediate employer, and his sole responsibility is also to him.[1] But where, by the usage of trade, or the express or implied agreement of the parties, a sub-agent is to be employed, there a privity is deemed to exist between the principal and the sub-agent, and the latter may, under such circumstances, well maintain his claim for such compensation, both against the principal and the immediate employer, unless exclusive credit is given to one of them; and, if it is, then his remedy is limited to that party.[2]

§ 388. In the next place, in relation to the lien of sub-agents. We have seen, that, ordinarily, an agent has not a power to substitute a sub-agent in his stead, so as to bind the principal to the act of the latter, except where there is an express agreement, or usage of trade, which justifies it.[3] We have also seen, that, generally, a sub-agent is only responsible to his immediate employer, and not to the paramount principal;[4] although this, again, may be affected by the express agreement of the parties, or by the usage of trade, creating a direct privity between them.[5] If, therefore, no privity exists between the principal and the sub-agent, no lien can be acquired by the latter against the former, unless so far as he may claim, by way of substitution, the lien of his immediate employer, of which we shall presently speak. But, wherever such a privity does exist, the sub-agent will incur a direct and immediate responsibility to the principal, and not merely to the agent who employs him.[6] He will also have a reciprocal personal claim against the principal, and will be clothed with a lien against him to the extent of the services per-

[1] Ante, §§ 13–15, 217; Cull *v.* Backhouse, cited 6 Taunt. 148; Schmaling *v.* Tomlinson, 6 Taunt. 147. [Thus, in the case of a band leader who had contracted to furnish a given number of musicians to play at a fair, it was held that the leader, and not his subordinates, must sue for breach of the contract. Corbett *v.* Schumaker, 83 Ill. 403. — Ed.]

[2] Ibid.

[3] Ante, §§ 13–15.

[4] Ante, §§ 13–15, 217.

[5] Ante, §§ 217, 289.

[6] Ante, §§ 201, 217.

formed, and the advances and disbursements properly made, by him, on account of the sub-agency.[1]

§ 389. A sub-agent, who is employed by an agent to perform a particular act of agency, without the privity or consent of the principal, may also acquire a lien upon the property thus coming into his possession, against the principal, for his commissions, advances, disbursements, and liabilities thereon, if the principal adopts his acts, or seeks to avail himself of the property or proceeds, acquired in the usual course of such sub-agency.[2] For the principal will not be allowed to avail himself of the benefits of the transaction, without at the same time subjecting himself to its burdens.[3] If he ratifies the acts of the sub-agent, he thereby clothes those acts with all the proper accompaniments of an original authority.[4] If he does not ratify them directly, still, if he seeks to avail himself of the acts of the sub-agent, so as to found derivative rights upon them, and not merely to avail himself of his original rights in his own property, paramount of those acts and independent of their aid, he must take the acts with all the responsibilities and charges, and incidents annexed to them, according to the well-known maxim, Qui sentit commodum, sentire debet et onus.[5] But a sub-agent has no general lien upon the property of the principal, on account of any balance due to him from the immediate agent, who employs him, when he knows or has reason to believe, that the latter is acting for another person at the time of his sub-agency.[6] At the same time, however,

[1] Snook *v.* Davidson, 2 Camp. 218; Lanyon *v.* Blanchard, 2 Camp. 597; Man *v.* Shiffner, 2 East, 523, 529; Lincoln *v.* Battelle, 6 Wend. 475.

[2] Montagu on Lien, Pt. 1, ch. 4, pp. 72–74; Snook *v.* Davidson, 2 Camp. 218; Lanyon *v.* Blanchard, 2 Camp. 597, 598; Westwood *v.* Bell, 4 Camp. 348, 353; [Chamberlin *v.* Collinson, 45 Iowa, 429].

[3] Ante, §§ 242–244, 249.

[4] Ante, §§ 253, 258, 259. See also Willinks *v.* Hollingsworth, 6 Wheat. 259. We should carefully distinguish between cases of this sort, and cases where the principal seeks only to avail himself of his original rights in his property, which has been improperly confided to, and sold by, a sub-agent. The bringing of a suit for the property, or for the proceeds, under such circumstances, will not subject the principal to the charges and expenditures incurred thereon by the sub-agent, unless the form of the action establishes a ratification of the proceedings. See Ante, § 259, and note; Schmaling *v.* Tomlinson, 6 Taunt. 147; [Danaher *v.* Garlock, 33 Mich. 295].

[5] 1 Co. R. 99; Branch, Maxims, 182 (ed. 1824); Solly *v.* Rathbone, 2 M. & Selw. 298; Cockran *v.* Irlam, 2 M. & Selw. 301, note; Ante, § 113, and note.

[6] Maans *v.* Henderson, 1 East, 335; Man *v.* Shiffner, 2 East, 523, 529, n.; Westwood *v.* Bell, 4 Camp. 348; Montagu on Lien, B. 1, Pt. 4, ch. 4, pp. 74–76.

he will be at liberty to avail himself of his general lien against the principal to the extent of the lien, particular or general, which the agent himself has at the same time against the principal, by way of substitution to the rights of the agent, if the acts of the latter, or his own, are not tortious.[1] In this respect, there seems to be an admitted difference between the case of a pledge, or other unauthorized act, by an agent or factor, which is treated as a tortious act, and the creation of a sub-agency, and the delivery of the property to the sub-agent, in order to effectuate the original purposes of the principal, according to the usual course of business.[2] In the latter case, the delivery of the property to the sub-agent is treated as a rightful pledge, *sub modo*, in his favor, to the extent of the lien of the original agent.[3]

§ 390. In many cases, however, a sub-agent, who acts without any knowledge, or reason to believe, that the party employing him is acting as an agent for another, will acquire a rightful lien on the property, for his general balance. Thus, for example, if a sub-agent, or broker, at the request of an agent, should effect a policy on a cargo, supposing it to be for the agent himself, but, in fact, it should be for a third person, for whom the agent has purchased the cargo, and afterwards, and while the policy is in the broker's hands, he should make advances to the agent, before any notice of the real

[1] Maans *v.* Henderson, 1 East, 335; Man *v.* Shiffner, 2 East, 523, 529; M'Combie *v.* Davies, 7 East, 7; Solly *v.* Rathbone, 2 M. & Selw. 298; Cockran *v.* Irlam, 2 M. & Selw. 301, note; Schmaling *v.* Tomlinson, 6 Taunt. 147; Montagu on Lien, B. 1, Pt. 4, ch. 4, pp. 74–76. In the case of Snook *v.* Davidson, 2 Camp. 218, it seems to have been held by Lord Ellenborough, that the sub-agent could not hold, by way of substitution, the lien of his immediate employer for his general balance against the principal, but only his lien for the premium on the particular policy. This doctrine may not, at first sight, seem reconcilable with the decision of the court in Man *v.* Shiffner, 2 East, 523, where a sub-agent of a policy was held entitled to retain, to the extent of the general balance of his immediate employer, against the principal. The distinction between the cases seems to be, that, in the case in 2 East, 523, the employment of the sub-agent was in the usual course of business; whereas, in the case in 2 Camp. 218, it was held, that there was no privity between the principal and the sub-agent, he not being employed in the usual course of business. But, as the principal sought to recover the policy, so procured by the sub-agent, it seems difficult to perceive why the action did not amount to a ratification of the sub-agency; and then the sub-agent, as servant of his immediate employer, would be entitled to retain for the general balance, upon the principle decided in 2 East, 523.

[2] Ante, §§ 78, 113, 235; Solly *v.* Rathbone, 2 M. & Selw. 298; Cockran *v.* Irlam, 301, note; Montagu on Lien, B. 1, Pt. 4, ch. 4, p. 78.

[3] M'Combie *v.* Davies, 7 East, 7; Ante, § 113, and note.

state of the title to the property, he will be entitled to a lien on the policy, and on the money received on it, to the extent of the money so advanced, and also (as it should seem) for his general balance of account against the agent.[1] For the broker may well be supposed

[1] Mann *v.* Forrester, 4 Camp. 60; Smith on Merc. Law, 340 (2d ed.); Id. pp. 515, 516 (3d ed. 1843); Montagu on Lien, B. 1, Pt. 4, ch. 4, pp. 75, 76; Westwood *v.* Bell, 4 Camp. 349, 353. In this last case, Lord Chief Justice Gibbs said: "I hold, that, if a policy of insurance is effected by a broker, in ignorance that it does not belong to the persons by whom he is employed, he has a lien upon it for the amount of the balance which they owe him. In this case, Clarkson has misconducted himself, and is liable for not disclosing that he was a mere agent in the transaction; but the defendants, who had every reason to believe that he was the principal, are entitled to hold the policy. If goods are sold by a factor in his own name, the purchaser has a right to set off a debt due from him, in an action by the principal for the price of the goods. The factor may be liable to his employer for holding himself out as the principal; but that is not to prejudice the purchaser, who *bonâ fide* dealt with him as the owner of the goods, and gave him credit in that capacity. The lien of the policy-broker rests on the same foundation. The only question is, whether he knew, or had reason to believe, that the person by whom he was employed was only an agent; and the party who seeks to deprive him of his lien must make out the affirmative. The employer is to be taken to be the principal till the contrary is proved. If the plaintiff's assent to the employment of Clarkson is denied, then he can have no right to the policy, and there is no privity between the parties. The argument about pledging the policy is fallacious. This never was a policy of the plaintiff's, which he held unincumbered, and handed over to his agent. In its very origin and creation it was burdened with the lien. It never has been the plaintiff's for an instant, but subject to the lien which is now claimed. The rights of the parties do not stand on the same footing as if Clarkson had said he had authority to pledge the policy; but, as if he had said: 'The goods to be insured are mine, the policy is for my benefit alone, and I agree that, when it is effected, it shall remain in your hands till the whole of the balance I owe you is satisfied; and on the strength, you will continue to trust me.' If that had passed, can I say, that the defendants are to be stripped of their rights on account of a fact of which they had no knowledge, and that they are to deliver up to a stranger the policy which they have effected under a contract, that they should hold it as a security for the balance due to them from their employer? Nor do the cases cited on the part of the plaintiff at all contradict the doctrine I am laying down. In Snook *v.* Davidson, the person who employed the defendants to effect the policy, said that it was for a correspondent in the country. In Lanyon *v.* Blanchard, likewise, the defendant must be taken to have had notice that the person who employed him was not the principal. The representation made by Crowgy, that he had authority to indorse the bill of lading, was abundantly sufficient to show that he was only an agent; and I entirely subscribe to what Lord Ellenborough is there supposed to have laid down respecting the risk which the defendant run in giving faith to that representation. The subsequent case of Mann *v.* Forrester is quite decisive. The doctrine stands upon authority as well as upon principle. I should have had no difficulty in determining the question, were it entirely new; and I find myself strongly fortified by the

to have made the advances, or delayed his demands, relying on the credit of the policy, which is allowed to remain in his hands.[1] So, if a factor should sell goods of his principal in his own name, without any notice on the part of the purchaser, that the goods are not his own, the purchaser will be entitled to set off a debt, due to him from the factor, against the price of the goods.[2] The ground of this doctrine undoubtedly is, that, where any person holds himself out as a principal, with the consent of the owner, third persons, who deal with him *bona fide*, are entitled to all the rights which they would have if he were the real principal.[3] And so, if a party assumes to act as principal, being only an agent, the real principal shall not be permitted to avail himself of the benefit of the transaction, without subjecting himself to the burdens which would attach to the transaction, if the ostensible party were the real party in interest.[4]

opinions of other judges." See also George *v.* Claggett, 2 Esp. 557; s. c. 7 T. R. 359; Rabone *v.* Williams, 7 T. R. 361, n.; Baring *v.* Corrie, 2 B. & Ald. 137.

[1] Ibid.

[2] Coppin *v.* Walker, 7 Taunt. 237; Lime Rock Bank *v.* Plimpton, 17 Pick. 159; 2 Smith's Leading Cases, 77, and notes (2d ed.). [If no limitation of the agent's authority was disclosed to the buyer, a set-off of a debt due from the agent, is a good defence to the claim of the principal against the purchaser for the price of the goods, notwithstanding the agent had agreed with the principal not to sell in his own name. *Ex parte* Dixon, L. R. 4 Ch. D. 133. So, where goods are sold by an agent in his own name by the consent of his principal. Borries *v.* Imp. Ottoman Bank, L. R. 9 C. P. 38. See Semenza *v.* Brinsley, 18 C. B. N. S. 467; but the American cases do not extend the rule so far. Thus, in Brown *v.* Morris, 83 No. Car. 251, it was held that where one buys goods from an agent, under a misapprehension that the goods belonged to the agent, and this was not brought about by the principal, he could not set off a claim against the agent. Stewart *v.* Woodward, 50 Vt. 78, and in Miller *v.* Lea, 35 Md. 396, it is said by the court, "If the character of the seller is equivocal, — if he is known to be in the habit of selling sometimes as principal and sometimes as agent, — a purchaser who buys with a view of covering his own debt, and availing himself of a set-off, is bound to inquire in what character he acts in the particular transaction; and if the buyer chooses to make no inquiry, and it should turn out that he has bought of an undisclosed principal, he will be denied the benefit of his set-off. If by due diligence the buyer could have known in what character the seller acted, there would be no justice in allowing the former to set off a bad debt at the expense of the principal" See Fish *v.* Kempton, 7 C. B. 687; Dresser *v.* Norwood, 17 C. B. N. S. 466; Turner *v.* Thomas, L. R. 6 C. P. 610; Priestly *v.* Fernie, 3 H. & C. 977; Young *v.* White, 7 Beav. 506. — Ed.]

[3] Ibid.

[4] Hovil *v.* Pack, 7 East, 164, 166; Fergusson *v.* Carrington, 9 B. & Cresw. 59; Ante, § 389. See Hurlburt *v.* Pacific Ins. Co. 2 Sumner, 471; Ante, § 389.

CHAPTER XV.

RIGHTS OF AGENTS IN REGARD TO THIRD PERSONS.

§ 391. HAVING considered the rights of agents in regard to their principals, we may next proceed to the consideration of their rights in regard to third persons, which will also include a review of the duties and obligations of the latter to the former. We have already had occasion to remark, that, in general, agents, acting openly and notoriously as such, do not, by their acts or contracts, made or done in the name of their principals, incur any personal responsibility whatever; but they are treated not so much as parties thereto, as they are as instruments through whom the acts or contracts of their principals are effected.[1] Hence it is, that, ordinarily, an agent, contracting in the name of his principal, and not in his own name, is not entitled to sue, nor can he be sued, on such contracts.[2] Thus, an agent selling the goods of his principal in his name, and as his agent, cannot ordinarily sue on the contract, as for goods sold and delivered. This is clearly illustrated in the common case of a sale made by a clerk or shopman in a shop, who has no right whatsoever to sue on the contract: but the right belongs exclusively to his superior or employer. So, if a purchase is made by a clerk or shopman, for and in the name of his principal, the latter only is liable on the contract; for the natural, if not the necessary, implication, in such cases, is, that credit is exclusively given to the principal, and that the clerk or shopman acts as a mere naked agent for him in making the bargain.[3] We have seen, that the Roman law originally proceeded upon an opposite principle, holding the agent, in such cases, personally and exclusively liable, until the prætor introduced an equitable remedy against the principal.[4]

§ 392. But there are exceptions to, or rather modifications of, the

[1] Ante, §§ 160, 161, 261–263.

[2] Ante, §§ 102, note, 160, 161, 169, 170, 261–263; Gunn *v.* Cantine, 10 John. 387; [Gray *v.* Pearson, L. R. 5 C. P. 568].

[3] Ante, §§ 160, 161, 261–263, 269, 270.

[4] Ante, §§ 163, 261, 262, 269, 271.

doctrine in both respects. We have already had occasion to state, that, where agents contract in their own name, although notoriously for their principals, they are deemed to be parties to the contract, and are liable thereon; and that such liability may exist, notwithstanding the principal is also liable on the same contract.[1] But the exceptions, or modifications of the doctrine, which now require our more immediate attention, respect the cases, where the agent acquires rights against third persons, notwithstanding he acts merely as agent. This subject naturally divides itself into two branches: first, the cases in which agents acquire rights, founded upon contracts made by them in that character, against third persons; and secondly, the cases in which they acquire rights against such persons, founded upon the torts of the latter to them in the course of their agency.

§ 393. And, first, in relation to the rights of agents against third persons, founded upon contracts made by them. These rights, being in derogation of the general doctrine already stated, apply only to special and particular cases. They are all resolvable into the following classes: First, where the contract is made in writing expressly with the agent, and imports to be a contract personally with him, although he may be known to act as an agent.[2] Secondly, where the agent is the only known or ostensible principal, and, therefore, is, in contemplation of law, the real contracting party.[3] Thirdly, where by the usage of trade, or the general course of business, the agent is authorized to act as the owner, or as a principal contracting party, although his character as agent is known.[4] Fourthly, where the agent has made a contract, in the subject-matter of which he has a special interest or property, whether he professed at the time to be acting for himself, or not.[5] In all these cases, the agent acquires

[1] Ante, §§ 154–159, 161, 266–270, 275; Pentz *v.* Stanton, 10 Wend. 271; Beebee *v.* Robert, 12 Wend. 413; Higgins *v.* Senior, 8 Mees. & Wels. 834; Ante, § 270, note.

[2] See Ante, §§ 266, 269, 275, 278; 3 Chitty on Com. & Manuf. 210, 211; Burrell *v.* Jones, 3 B. & Ald. 47; Iveson *v.* Conington, 1 B. & Cressw. 160; Post, §§ 394–396; Banfill *v.* Leigh, 8 T. R. 571. See Hudson *v.* Granger, 5 B. & Ald. 27, 32, 33; Fisher *v.* Ellis, 3 Pick. 322; Fairfield *v.* Adams, 16 Pick. 381; Ante, §§ 260, 260 *a*, 269, 270; 2 Kent, Comm. Lect. 41, pp. 631, 632 (4th ed.). But see Garland *v.* Reynolds, 2 Appleton, 45; [Clay *v.* Southern, 7 Exch. 717].

[3] Ante, §§ 102, note, 160, 161, 266–270, 293; Post, § 396.

[4] Ante, §§ 268–270, 278; Post, § 397.

[5] Smith on Merc. Law, p. 138 (3d ed. 1843). See Dunlap *v.* Lambert, 6 Clark & Finnell. 600, 626, 627; Post, §§ 394, 397, 407, 408, 424. [Where

personal rights, and may maintain an action upon the contract, in his own name, without any distinction, whether his principal is or is not entitled also to similar rights and remedies on the same contract.[1]

§ 394. The first class may be illustrated by the common instance of a promissory note, given to an agent as such, for the benefit of his principal, where the promise is, to pay the money to the agent *eo nomine*, in which case he may sue on the note in his own name.[2] So, a promissory note, promising to pay A. and B., "trustees of ——" (naming the corporation), may be sued by A. and B., as proper parties thereto.[3] So, a promissory note, made payable, or indorsed to A., "cashier," or order, may be sued by him personally, he being the cashier of a bank.[4] So, a promissory note, payable to A., "commissioner and agent for the inhabitants of the county of B.," may be sued by A., as a proper party.[5] So, if a promissory note should contain a promise by the maker to pay to A., for the use or the benefit of B., a certain sum of money, A., and not B., would be the proper person to maintain an action on the note.[6] So, a promise to pay A., "guardian of B.," may be sued by A., and cannot be sued by B.[7] So, a note to A. and B., trustees of the corporation of B., might be sued by A. and B., and not by the corporation.[8] So, where a bond is given to A., for the use of himself and B., it will be treated as a bond given to A., and he is solely entitled to sue thereon, as obligee; and B. can neither sue thereon, nor release it at law.[9] So,

an agent, employed simply to sell goods and pay over the money to his employer, exchanges such money with a third person, receiving in exchange a counterfeit bill, he may maintain an action in his own name to recover the money paid out by him. Kent *v.* Bornstein, 12 Allen, 342; Bryan *v.* Wilson, 27 Ala. 215. — R.]

[1] Ante, §§ 160, 162, 268–270, 272–275, 278; [The United States Telegraph Co. *v.* Gildersleve, 29 Md. 232].

[2] Commercial Bank *v.* French, 21 Pick. 486; Fairfield *v.* Adams, 16 Pick. 381; Fisher *v.* Ellis, 3 Pick. 322; Ante, §§ 260, 260 *a*, 269, 270. But see Inhabitants of Garland *v.* Reynolds, 2 Appleton, 45, and other cases cited in note to Ante, § 269; Binney *v.* Plumley, 5 Vt. 500.

[3] Binney *v.* Plumley, 5 Vt. 500.

[4] McHenry *v.* Ridgely, 2 Scamm. (Ill.) 309; Porter *v.* Nekervis, 4 Rand. (Va.) 359; Post, § 395; [Johnson *v.* Catlin, 27 Vt. 89].

[5] McConnell *v.* Thomas, 2 Scamm. (Ill.) 313. But see Ante, § 269, note; and Post, § 395.

[6] Buffum *v.* Chadwick, 8 Mass. 103; [Doe *v.* Thompson, 2 Foster, 217].

[7] Wheelock *v.* Wheelock, 5 Vt. 433.

[8] Binney *v.* Plumley, 5 Vt. 500.

[9] Offley *v.* Warde, 1 Lev. 235. See also the Reporter's note to Piggott *v.* Thompson, 3 Bos. & Pull. 149 (*a*).

where an acceptance is, to pay an agent the amount of a bill of exchange, he may, although he is a known agent, sue thereon in his own name.[1] So, if an agent is the shipper of goods, and by the bill of lading they are deliverable to him or his assigns, he paying freight, he may sue thereon, although he is a known agent; for the bill of lading amounts to a direct contract with him.[2] So, if a sale note purport to be made by A., on account of B., and the purchaser to pay A., by a bill payable at a future day, it seems, that A. may sue on the contract, especially if he has a beneficial interest in it.[3] So, if a negotiable note is indorsed in blank, and sent by the owner to his agent for collection, the agent may sue thereon in his own name, as indorsee.[4] So, where a policy of insurance is procured to be underwritten by an agent in his own name, for the benefit of a particular person, or for whom it may concern, the agent may sue thereon, in his own name, for any loss occurring under the policy; for he is treated as a direct party to the contract, and the underwriter undertakes to pay the loss to him.[5] And yet, in such a case,

[1] Van Staphorst *v.* Pearce, 4 Mass. 258.

[2] See Joseph *v.* Knox, 3 Camp. 320; Griffith *v.* Ingledew, 6 Serg. & R. 429. But see Abbott on Shipp. Pt. 3, ch. 2, § 3, p. 216 (Amer. ed. 1829); Id. Pt. 3, ch. 7, § 4, pp. 285–287, and notes to Amer. ed. 1829. See Sargent *v.* Morris, 3 B. & Ald. 277; Ante, §§ 263, 264. [But it has been held that where an agent pursuant to his instructions delivers to a common carrier moneys of his principal consigned to and to be transported to the principal, the consignor from the time of delivery ceases to have any title or interest therein, and cannot sue the carrier therefor. Thompson *v.* Fargo, 63 N. Y. 479. But in Blanchard *v.* Page, 8 Gray, 281, it was held that a shipper named in a bill of lading may sue the carrier for an injury to the goods, although he has no property general or special therein. See Finn *v.* Western R. R. Co., 112 Mass. 529; Wooster *v.* Tarr, 8 Allen, 270. — Ed.]

[3] Atkyns *v.* Amber, 2 Esp. 493.

[4] Solomons *v.* Bank of England, 13 East, 135, n.; Clerke *v.* Pigot, 12 Mod. 195; Adams *v.* Oakes, 6 Carr. & Payne, 70; De la Chaumette *v.* Bank of England, 9 B. & Cressw. 208; Little *v.* Obrien, 9 Mass. 423; Brigham *v.* Marean, 7 Pick. 40; Banks *v.* Eastin, 15 Martin, 291; Ante, §§ 227, 228; 1 Bell, Comm. § 412, p. 392 (4th ed.); Id. pp. 493, 494 (5th ed.); United States *v.* Dugan, 3 Wheat. 172, 180; Guernsey *v.* Burns, 25 Wend. 411; McConnell *v.* Thomas, 2 Scamm. (Ill.) 313; Story on Bills of Exchange, § 224. *Contra*, Thatcher *v.* Winslow, 5 Mason, 58; Sherwood *v.* Roys, 14 Pick. 172. The latter was a note payable to bearer, and held by the agent to collect; but no transfer of the property was intended. There were some peculiarities in this case, as well as in that of Thatcher *v.* Winslow, which distinguish them from the other cases, and may, perhaps, reconcile them with the general doctrine stated in the text.

[5] Ante, §§ 109, 111, 160, 161, 272, 273; Post, § 498; 2 Story on Eq. Jurisp. § 460; Usparicha *v.* Noble, 13 East, 332; Sargent *v.* Morris, 3 B. & Ald. 277, 280.

there is no doubt that the principal may sue in his own name, on the same policy.[1] So, in the case of a bill of lading, signed by the master, he may sue for the freight and primage.[2] So, upon a charter-party, executed by the master in his own name, on behalf of the owner, he may sue for any breach of the covenants contained therein on the part of the charterer.[3] Indeed, for many purposes, as we have already seen, masters of ships are treated as possessing the powers and rights of owners.[4] The same principle applies generally to cases where contracts are made by agents with third persons, under the seal of both parties, and the contracts are in their own proper names; for, in such cases, the principal cannot be treated as a party in form, or entitled to avail himself of the contract *ex directo*, however he may be indirectly bound by, or entitled to avail himself of it.[5]

§ 395. In all the foregoing cases, it is apparent, that the agent

[1] Ibid. We have already seen, that this doctrine is not peculiar to the English law; but that it is recognized in the jurisprudence of continental Europe. See Ante, §§ 109, 111, 272, 273; 1 Emerig. Assur. ch. 5, § 3, pp. 137, 138; Id. § 4, pp. 139–141; Pothier, Traité d'Assur. n. 96; 2 Valin, Com. Liv. 3, tit. 6, art. 3, pp. 132, 133. In Sargent *v.* Morris, 3 B. & Ald. 277, 280, Mr. Justice Bayley, said: "Now, I take the rule to be this, — if an agent acts for me, and on my behalf, but in his own name, then, inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name to say, that he is merely an agent, unless you can also show that he is prohibited from carrying on that action by the person on whose behalf the contract was made. In such cases, however, you may bring your action, either in the name of the party by whom the contract was made, or of the party for whom the contract was made. In policies of insurance, it is a common practice to bring your action, either in the name of the agent or principal." Where the policy of insurance is under seal, there, upon principles already suggested, the action must be brought exclusively in the name of the agent. 3 Chitty on Com. & Manuf. 211; Ante, §§ 155, 160–162; Id. 272–278; Shack *v.* Anthony, 1 M. & Selw. 573. [The action on a policy of insurance taken out by a broker in his own name may be brought either by the agent or by the principal, although there is no mention made of the latter in the policy. Browning *v.* Prov. Ins. Co. of Canada, L. R. 5 P. C. 263; Prov. Ins. Co. of Canada *v.* Leduc, L. R. 6 P. C. 224. — Ed.]

[2] Abbott on Shipp. Pt. 3, ch. 7, § 4, pp. 282–288 (Amer. ed. 1829); Id. Pt. 3, ch. 3, § 11, pp. 246–249.

[3] Abbott on Shipp. Pt. 3, ch. 1, § 2 (Amer. ed. 1829); Ante, §§ 116, 158, 161, 273, 278, 294; 3 Chitty on Com. & Manuf. 210, 211; Post, §§ 399, 400.

[4] Ante, §§ 116, 160 *a*, 161, 294, 298, 299.

[5] Ante, §§ 155, 160, 160 *a*, 161, 162, 272, 273, 275–278; Hopkins *v.* Mehaffy, 11 Serg. & R. 129; Ante, § 273, note (1); 3 Chitty on Com. & Manuf. 211; Hanford *v.* McNair, 9 Wend. 54; Blood *v.* Goodrich, 9 Wend. 68; Spencer *v.* Field, 10 Wend. 87; Potts *v.* Rider, 3 Hamm. (Ohio) 71.

is the direct party, with whom the contract is made; and therefore no difficulty can arise as to his title to sue.[1] But it is sometimes a matter of difficulty, upon the face of a writing, to ascertain who is the proper party contracted with, whether he be the principal, or the agent. In such cases, resort must be had to the whole instrument, in order to ascertain who that party is; and, when the proper interpretation is fixed, the law will act accordingly upon it. Some cases may be useful to illustrate the difficulty as well as to show the manner in which it has been overcome. Thus, for example, where A., in writing, agreed to pay the rent of certain tolls, which he had hired for three years of certain commissioners for drainage, "to the treasurer of the commissioners," it was held, that no action was maintainable by the treasurer in his own name for the rent, but that it was a promise to the commissioners to pay the rent to the person whom they should from time to time, appoint to receive it.[2] So, where certain persons signed a subscription paper, to take certain shares in a turnpike corporation, set against their names, and to pay on demand to A. B. or order, all assessments, made by the corporation for the purposes of the road; it was held, that A. B. (who was agent of the corporation) could not recover upon the promise in his own name; but that the suit must be brought in the name of the corporation, upon the ground, that, there being no consideration between the agent and the subscribers, he could not support an action.[3] So, where an attorney gave a receipt

[1] See Hudson *v.* Granger, 5 B. & Ald. 27, 32, 33.

[2] Piggott *v.* Thompson, 3 Bos. & Pull. 147, 150.

[3] Gilmore *v.* Pope, 5 Mass. 491; Ante, § 274. It is somewhat difficult to reconcile this case with other admitted doctrines. If there be a consideration for a promise, it does not seem material, from whom it comes. See on this point Piggott *v.* Thompson, 3 Bos. & Pull. 147, and the note (*a*) of the Reporters, p. 149. Lord Alvanley, in the case of Piggott *v.* Thompson, said: "It is not necessary to discuss, whether, if A. let land to B., in consideration of which the latter promises to pay the rent to C., his executors and administrators, C. may maintain an action on this promise." The Reporters, in their note, say: "This very point arose in Lowther *v.* Kelly, 8 Mod. 115, where the plaintiff's attorney had made a lease by indenture to the defendant in his own name, rendering rent to the plaintiff, whom the defendant covenanted to pay. But the case appears to have been adjourned, after argument, without any decision. It is said by Levinz, J., in Gilby *v.* Copley, 3 Lev. 138, that, when a deed is made *inter partes*, a stranger shall not take advantage of a covenant made for his benefit. But, where it is not made *inter partes*, he may, whether the deed be indented or not. For this he cites Cooker *v.* Child, Hil. 24 and 25, Car. 2, B. R., which was an action on a charter-party indented in these terms: 'This indented charter-party witnesseth, that Bindley, master and part owner of the

by which he acknowledged, that he had received of A. B. an agreement between C. & D. "assigned to S. S., to collect the money

ship, with the consent of Cooker, the other part owner, hath let the ship to Child, on such a voyage;' and Child covenanted with Bindley, *necnon* with Cooker, to pay £300; and it was held, that Cooker might maintain the action. Lord Holt, also, in Salter *v.* Kingley, Carth. 77, held, that one party to a deed could not covenant with another, who was no party, but a mere stranger to it. So, where a bill was sealed in this manner, 'Received of A. £40 to the use of B. and C., equally to be divided, to be repaid at such a time to the use of B. and C.,' it was resolved, that B. and C. might each sue for £20. Shaw *v.* Sherwood, Cro. Eliz. 729, affirmed in error, Yelv. 23. But, where a bond was made to A. for the benefit of B., it was adjudged the latter could neither sue upon it, nor release it, he not being a party to the bond. Offley *v.* Ward, 1 Lev. 235. Vide etiam 2 Inst. 673. With respect to the right of a third person to sue upon a parol promise made to another for his benefit, there is great contradiction among the older cases, all which are collected, 1 Vin. Abridg. fol. 333–337, *Actions of Assumpsit*, Z. But, in Dutton *v.* Poole, Mich. 29, Car. 2, B. R. 2 Lev. 210; s. c. 1 Vent. 318; s. c. Sir T. Raym. 302; and s. c. Sir T. Jones, 102, the point seems to have been very fully considered and very solemnly decided. There, the father of the plaintiff's wife, being seised of a wood, which he intended to sell to raise fortunes for younger children, the defendant being his heir, in consideration that he would forbear to sell it, promised to pay his daughter, the plaintiff's wife, £1,000, for which the action was brought; and it was held, that the plaintiff might well maintain the action; which decision was affirmed in the Exchequer Chamber. In that case, indeed, some stress was laid upon the nearness of relationship between the plaintiff's wife and her father, to whom the promise was made. But another case has since occurred, to which that reason does not apply. In Martin *v.* Hinde, Cowp. 437, the plaintiff declared against the defendant, rector of A., upon an instrument in writing, dated, &c., whereby the defendant promised the plaintiff to retain him as curate, till, &c., and to allow him £50 per annum. The instrument produced in evidence was a certificate, addressed to the bishop, whereby the defendant nominated the plaintiff his curate, and promised to allow him £50 per annum. Upon this evidence the plaintiff was, after argument, held entitled to recover against the defendant. So in Marchington *v.* Vernon, 1 Bos. & Pull. 101, in notis, Buller, J., expressly says: 'If one person makes a promise to another for the benefit of a third, that third may maintain an action upon it.'" The decision in Gilmore *v.* Pope, 5 Mass. 491, seems also in direct conflict with the doctrine in Higgins *v.* Senior, 8 Mees. & Wels. 834, 844; Ante, §§ 160, 160 *a*, 270. See also Binney *v.* Plumley, 5 Vt. 500. See also 2 Liverm. on Agency, 217–220 (ed. 1818); Taunton and South Boston Turnpike *v.* Whiting, 10 Mass. 327, 336, commenting on Gilmore *v.* Pope, 5 Mass. 491. [In Colburn *v.* Phillips, 13 Gray, 66, Hoar, J., said: "In Gilmore *v.* Pope, 5 Mass. 491, which was an action upon a subscription for shares in a turnpike company, with a promise to pay the assessments to the plaintiff, who was an agent of the company, the plaintiff was nonsuited, and Parsons, C. J., said: 'The action cannot be maintained in the name of a mere agent of the corporation, as in this transaction the plaintiff has alleged himself to be; there being no consideration, as between the agent and subscribers, to support an action of assumpsit.' This remark of the chief justice would seem

therein contained," it was held, that A. B., being the mere agent of S. S., could not sue the attorney for the moneys collected; but that the

to assume that, to support a promise, the consideration must always move from the party to whom the promise is made. On examining the case, the promise is found to be a part of the contract to take and pay for shares in the turnpike road, in consideration of being admitted as associates in the corporation. This is very clearly a contract with the corporation. The promise is to pay the assessments to Gilmore, or order; but there is not in terms any promise to Gilmore himself. The apparent purport, then, as well as the legal effect, of the instrument, was an agreement with the corporation from whom the consideration proceeded. It would therefore stand as a promise to A., upon a consideration received from A., to pay a sum of money to B.; upon which it is now well-settled in this commonwealth that B. can maintain no action, except under certain peculiar and limited conditions. Mellen *v.* Whipple, 1 Gray, 317; Field *v.* Crawford, 6 Gray, 116; Dow *v.* Clark, 7 Gray, 198. In Buffum *v.* Chadwick, 8 Mass. 103, the court decided, that where a note was made to the plaintiff, describing him as agent of the Providence Hat Manufacturing Company, the action could be maintained by him, although the objection was suggested that he was a mere agent, and that the consideration moved from the company alone. They distinguish the case of Gilmore *v.* Pope, which was cited by the defendants' counsel, and observe that in that case 'the contract was directly with the corporation.' In the case of Commercial Bank *v.* French, 21 Pick. 486, it was decided, that a promissory note made to 'the cashier of the Commercial Bank,' the note being the property of the bank, was a contract with the bank, on which the corporation might sue. Gilmore *v.* Pope is cited as sustaining the decision; but the case rests upon the doctrine that, by a just construction of the language used, as terms of description, the contract was made with the bank. In Eastern Railroad *v.* Benedict, 5 Gray, 561, it was determined that upon an order payable 'to D. A. Neale, President of the Eastern Railroad Company,' the corporation, being the real party in interest, might sue in its own name. The authorities were fully examined and discussed, and we are satisfied with the correctness of the decision; but no question arose in that case whether the action might not have been maintained, if brought in the name of the payee. In Gunn *v.* Cantine, 10 John. 387, the action was upon a receipt given to an attorney, upon an undertaking to collect the money due upon a contract belonging to his principal; but the court notice the fact that there was no express promise to pay the money collected to the attorney; and only decide that the promise implied by law from the instrument was to the principal; a view consistent with that which we have suggested in regard to the case of Gilmore *v.* Pope. There is a class of cases in which it has been held that a promise to a public officer, in his official capacity, must be enforced by a suit in the name of the public body for which he acts. Piggott *v.* Thompson, 3 Bos. & Pull. 147; Irish *v.* Webster, 5 Greenl. 171; Garland *v.* Reynolds, 20 Me. 45. The principle is analogous to that which holds that one who signs a contract as a public officer is not personally responsible upon it; though the ground upon which it is put is, that a just construction of the contract makes it the contract of the principal. In Thatcher *v.* Winslow, 5 Mason, 58, Mr. Justice Story held, that an agent not having any legal or equitable interest in a promissory note, cannot sue as indorsee upon it. The only authorities which he names in support of

suit should be by S. S. So, where a bill of lading acknowledged that the master had received the goods of A., and the master undertook to deliver them to A., and in his name, according to usage, to B. or his assigns (he or they), paying freight; and the goods were the property of A.; it was held, that A. not B. ought to bring a suit for the goods, or for damages done to them.[1] So, where a bill of lading was for a shipment of goods consigned to A. for the account of B.; it was held that B. and not A. was the proper party to bring

the doctrine, are Gunn *v.* Cantine and Gilmore *v.* Pope, before cited. If the effect of the decision is merely this, that putting a promissory note into the hands of an agent, indorsed in blank, without any authority, express or implied, to him to bring a suit upon it, will not constitute such a transfer of the note to him as will support an action upon it in his name, we have no doubt of its correctness. Sherwood *v.* Roys, 14 Pick. 172. But in Story on Agency, § 394, it is said that 'if a negotiable note is indorsed in blank, and sent by the owner to his agent for collection, the agent may sue thereon in his own name as indorsee;' and in § 161, that 'if an agent should procure a policy of insurance in his own name, for the benefit of his principal, the agent, as well as the principal, may sue thereon.' In §§ 392, 393, 395, 396, the doctrine is stated in the broadest terms, that whenever the contract is made in writing expressly with the agent, and imports to be a contract personally with him, and also where he is the only known or ostensible principal, and therefore is, in contemplation of law, the real contracting party, he may sue in his own name. And such is the general current of the authorities; and we are satisfied that, to support an action upon an express promise, it is in general immaterial whether the consideration move from the promisee or from another. In Baxter *v.* Read, cited in Dyer, 272 *b*, note, it was 'adjudged, that where Baxter had retained Read to be miller to his aunt, at ten shillings per week, this will support an action on the case; for although it is not beneficial to Baxter, it is chargeable to Read' In Goodwin *v.* Willoughby, Pop. 178, Doderidge, J., says: 'If a stranger saith, "Forbear such a debt of J. S. and I will pay it," it is a good consideration for the loss to the plaintiff.' In Sargent *v.* Morris, 3 B. & Ald. 277, it was held, that the consignee could not sue for damage to goods shipped on board the defendant's vessel, the consignee being only the agent of the consignors, and having no present interest in the goods at the time of the injury. But there the bill of lading stated the receipt of the goods from the consignors, and undertook 'to deliver the same to you, and in your name, according to custom and usage, to Mr. Sargent or his assigns, paying freight,' &c. In Sims *v.* Bond, 5 B. and Adolph. 393, and 2 Nev & Mann. 616, Lord Denman asserts, that 'it is a well-established rule of law, that where a contract, not under seal, is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it.' In the case at bar, the contract was with the plaintiff in his own name, no other principal was disclosed, and it was executed on his part. We think the promise of the defendants was upon a sufficient consideration, and may be enforced by the person to whom it was expressly made." — R.]

[1] Sargent *v.* Morris, 3 B. & Ald. 277. See also Evans *v.* Marlett, 1 Ld. Raym. 271; 12 Mod. 156; 3 Salk. 291; Ante, §§ 263, 269, 274, 394.

an action for the non-delivery.[1] So, where the mayor of a corporation, in behalf of himself and the rest of the burgesses and commonalty of the corporation, signed in his own name, as mayor, a memorandum of a sale of some real estate of the corporation with the purchaser, and they thereby mutually agreed to perform and fulfil, on each of their parts respectively, the conditions of the sale; it was held, that the mayor could not maintain an action upon the agreement against the purchaser for a breach thereof; for he acted merely as agent of the corporation, and did not contract on behalf of himself personally.[2] So, where a note was given by B. to A., "Treasurer of the committee of the surplus fund" of a town, for money loaned by it with the authority of the town, it was held, that the suit was properly brought in the name of the town, and could not be properly brought by A. in his own name, as he had no

[1] Ibid. It has been matter of some contrariety of opinion, whether, if a bill of lading contains a clause, that the goods shall be delivered to the shipper or his assigns, and it is indorsed to an agent of the shipper, the agent can, as consignee, maintain an action for the non-delivery or conversion of the goods, as he has no interest in them before they come to hand. In Coxe *v.* Harden, 4 East, 211, the court intimated a strong opinion, that he could not. Lord Ellenborough, in Waring *v.* Cox, 1 Camp. 369, ruled the same point the same way. But Mr. Paley says, that it seems at present to be settled, that he may, provided the consignment be not countermanded. But for this he cites no authority, except an unreported anonymous decision before Lord Ellenborough, at the sittings after Trinity Term, 1810. See Abbott on Shipp. Pt. 3, ch. 2, § 3, p. 216 (Amer. ed. 1829); Ante, § 274, and note. In Griffith *v.* Ingledew, 6 Serg. & R. 429, goods were shipped at Liverpool by A. on his own account, but by the bill of lading they were made deliverable to B. or his assigns at Philadelphia. The freight on the goods was paid at Liverpool by A. It was held, that B. could maintain an action against the owner of the ship for loss by the negligent carriage of the goods, although B. was but an agent; for the legal property by the bill of lading vested in B. in trust for A. This last case contains a review of the English decisions, and, as there was a difference of opinion on the Bench (Mr. Justice Gibson dissenting), the point was examined with extraordinary care and ability. See Amos *v* Temperley, 8 Mees. & Wels. 798; Ante, §§ 263, 274; Dunlap *v.* Lambert, 6 Clark & Fin. 600, 626, 627; Ante, § 274, and note.

[2] Bowen *v.* Morris, 2 Taunt. 374; Ante, § 154. It must be admitted, that some of these cases stand upon very nice and critical grounds. The true principle undoubtedly is, that, wherever, taking the whole language of the instrument together, it is to be inferred, that the promise is made, not to the agent personally, but through him to the principal, there the suit should be brought in the name of the principal, and not of the agent. But there certainly is no legal difficulty in making a promise to an agent to pay him money, or to deliver to him goods for the use or benefit of his principal; and in such a case it should seem, that the agent might maintain a suit in his own name upon such a contract. See Ante, § 154.

interest in the note.[1] So where a note was given to A., the land agent of a state, in his official capacity, it was held, that the suit ought to be brought in the name of the state, and not of A.[2] So, where a note was given payable "to the cashier of the Commercial Bank, or order," it was held, that the bank might properly maintain a suit thereon in its corporate name.[3] So, where a person subscribed an engagement to pay to A. B., or order, all assessments on shares taken by him in a turnpike corporation, it was held, that the corporation might maintain an action thereon, A. B. being their agent, and that the agent, A. B., could not.[4] So, a note given to A., "as town treasurer," is not suable in his own name, but is suable in the name of the town.[5] The like interpretation has been applied to a note payable to A., "town treasurer, or his successors in office,"[6] and to a note payable to the selectmen of the town of A.[7]

§ 396. The second class of cases would seem scarcely to require any illustration; for, as the agent acts in his own name, without disclosing any other principal, it follows, as an irresistible inference, that the other contracting party binds himself personally to the agent. This, indeed, would seem justly to follow from the reciprocity of obligation on the other side; for (as we have already seen)

[1] The Inhabitants of Garland *v.* Reynolds, 2 Appleton, 45. But see Ante, § 394.

[2] Irish *v.* Webster, 5 Greenl. 171.

[3] Commercial Bank *v.* French, 21 Pick. 486; Ante, §§ 154, 155, 161, 269, 270, 275. See also Medway Cotton Manufactory *v.* Adams, 10 Mass. 360; Ante, § 269, note; [Woodstock Bank *v.* Downer, 27 Vt. 482; Eastern Railroad *v.* Benedict, 5 Gray, 561].

[4] Taunton & South Boston Turnpike *v.* Whiting, 10 Mass. 327; Gilmore *v.* Pope, 5 Mass. 491. It is very difficult, if not impracticable, to reconcile all the cases upon this subject. Many of them might be reconciled by the doctrine, that either the agent or the principal might sue in such cases. [See Dupont *v.* Mount Pleasant Co., 9 Rich. 259.]

[5] Hinds *v.* Stone, Brayton, 230.

[6] Arlington *v.* Hinds, D. Chipman, 431.

[7] Middlebury *v.* Case, 6 Vt. 165. [But it was held in a later case that a promissory note, payable to "A. B., Cashier," might be sued by A. B. in his own name. Johnson *v.* Catlin, 27 Vt. 87. And where a submission to arbitration had been made by one of the parties, as "H. S., agent for owners of Schooner A.," and thereupon an award was made in favor of the other party, a bill in equity, filed by "H. S., as agent, &c.," was dismissed, and it was held that, the process being in equity, it should have been brought in the name of the owners. Sutton *v.* Mansfield, 47 Conn. 388. And an action by owners to recover rent under a lease not under seal, and signed by the lessee only, made in the name of their agents described "as landlords," can be maintained. Nicoll *v.* Burke, 78 N. Y. 581. — Ed.]

the agent is in every such case undeniably bound by his personal promise to the other party.[1] Hence it is, that if an agent sells the goods of his principal in his own name, and as if he were owner, he is entitled to sue the buyer for the price in his own name, although the principal may also sue.[2] And, on the other hand, if he buys goods in his own name, as purchaser, he may maintain action on the contract against the seller, whether it be for a delivery thereof, if wrongfully withheld, or upon any warranty on the same, in the same manner as if he were the only party in interest.[3] The principle will apply with far greater force, when the agent has an interest in the property, or a lien on it, as we shall more fully see in the succeeding pages.[4]

§ 397. The third class of cases is, where, by the usage of trade, or the general course of business, the agent, although known to be acting as such, is dealt with as if he were the owner or principal, so that the contract is deemed a personal contract with him. In cases of this sort, it seems to be wholly immaterial, whether the contract is deemed to be exclusively made with the agent, or whether the real principal, also, has a right as an implied party, to avail himself of the contract.[5] The fourth class of cases is, where the agent has made a contract, in the subject-matter of which he has a special interest or property, whether he professed at the time to be acting for himself or not. For the most part, the illustrations arising under the third and fourth classes, embrace mixed considerations, dependent upon the usage of trade and business, and a special interest or property of the agent in the thing contracted for, or the business done. They will, therefore, be conveniently discussed together. It may be laid down, as a general rule, that wherever an agent, although known to be such, has a special property in the subject-matter of the contract, and not a bare custody thereof, or

[1] Ante, §§ 266–270, 290, 291; 3 Chitty on Com. & Manuf. 211–214; Ante, § 160; Leeds *v.* The Marine Ins. Co. 6 Wheat. 565; Sims *v.* Bond, 3 B. & Adolph. 393.

[2] Ante, §§ 290, 291, 293; Beebee *v.* Robert, 12 Wend. 413; Bickerton *v.* Burrell, 5 M. & Selw. 383. [See also Rayner *v.* Grote, 15 Mees. & Wels. 359; Post, § 496, note; Tyler *v.* Freeman, 3 Cush. 261.]

[3] Ante, §§ 290, 291, 293; Beebe *v.* Robert, 12 Wend. 413; Bickerton *v.* Burrell, 5 M. & Selw. 383. [See also Rayner *v.* Grote, 15 Mees. & Wels. 359; Post, § 496, note.]

[4] 1 Liverm. on Agency, 220 (ed. 1818); 3 Chitty on Com. and Manuf. 211; Post, § 397.

[5] Ante, §§ 269, 270, 272–280; Post, §§ 403–412, 418–440.

where he has acquired an interest in it, or has a lien upon it, he may, in all such cases, sue upon the contract.[1] Thus, for example, as we have seen, an auctioneer may maintain an action in his own name, for goods sold by him at public or private auction.[2] It will make no difference in the case, that the goods are even sold on the land of the owner, and are known to be his property; for an auctioneer has a possession, coupled with an interest, in goods which he is employed to sell, and not a bare custody, like a servant or shopman.[3] An auctioneer, also, has a special property in the goods to be sold, and a lien for the charges of the sale, and for his commissions.[4]

§ 398. Upon a similar ground, if an agent is answerable to his principal for the price of the goods sold by him, or for any other debt contracted by or with him in the course of his agency, he will be entitled to sue for the price, or other debt, in his own name.[5] Thus, for example, an agent selling under a *del credere* commission, is entitled to sue for the price of the goods sold by him. Indeed, as between himself and the vendee, he is generally treated as the owner of the goods; and of course he is entitled to the general rights of an owner; but still he is so, subject to the superior rights of the principal, not incompatible with his own.[6] So, if an agent procures a policy of insurance in his own name for his principal, and pays the premium; and it turns out, in the event, that the policy never attached, or is void from some circumstance of which he had no knowledge; he may sue for and recover back in his own name the premium which he has paid therefor.[7] So, if an agent has transferred the money or property of his principal, under circumstances which gave him a right to recover it back, he may do so in his own name, notwithstanding his principal may maintain a like suit therefor; the agent (as was said by Lord Mansfield) may main-

[1] Atkyns *v.* Amber, 2 Esp. 493; Ante, § 164; Joseph *v.* Knox, 3 Camp. 320; Williams *v.* Millington, 1 H. Bl. 81, 84; Sargent *v.* Morris, 3 B. & Ald. 276, 280, 281; 3 Chitty on Com. & Manuf. 210, 211; Leeds *v.* The Marine Ins. Co. 6 Wheat. 565.

[2] Ante, § 27.

[3] Ante, § 27; Williams *v.* Millington, 1 H. Bl. 81, 84. See also Coppin *v.* Walker, 7 Taunt. 237; 3 Chitty on Com. & Manuf. 210, 211; Coppin *v.* Craig, 7 Taunt. 243; [Robinson *v.* Rutter, 30 Eng. Law & Eq. 401].

[4] Williams *v.* Millington, 1 H. Bl. 81–85; Ante, § 27.

[5] 3 Chitty on Com. & Manuf. 210, 211.

[6] Houghton *v.* Mathews, 3 Bos. & Pull. 485, 489; 3 Chitty on Com. & Manuf. 211; Post, §§ 402, 403.

[7] Oom *v.* Bruce, 12 East, 225. See Leeds *v.* Mar. Ins. Co. 6 Wheat. 565.

tain the suit from the authority of the principal, and the principal may maintain it, as proving it paid by the agent.[1] But perhaps, strictly speaking, the agent acquires such right, because of his responsibility for the money or property to his principal, and the interest which he has in indemnifying himself. Indeed, the proposition may be laid down in broader terms, that, if an agent pays money for his principal, by mistake or otherwise, which he ought not to have paid, the agent, as well as the principal, may maintain an action to recover it back.[2]

§ 399. The cases of contracts made by masters of ships, relative to their repairs and usual employment, and other incidental contracts, belonging to their office and duties, fall under the like consideration. We have seen that the master of a ship is ordinarily liable on all such contracts, made in virtue of his office; and there is a reciprocal obligation on the other party to the master.[3] Indeed, it would be an anomaly to hold that the contract is, for the purpose of charging the master, personal on his part; and, at the same time, that there is not, on the other side, a correspondent responsibility to him; since the foundation of the contract, in every such case, must be a mutual and reciprocal consideration, sufficient to create a mutual and reciprocal obligation.

§ 400. But the most common illustration of the third class of cases, and that, indeed, which presents the principles upon which it is founded in its clearest form, is that of a factor. In regard to foreign factors, it has been already stated that they are generally treated, not only as principals, in all contracts made with them and by them, but also as exclusive principals (unless other circumstances repel the presumption), whether they are known to be acting for

[1] Stevenson *v.* Mortimer, Cowp. 805; [Holt *v.* Ely, 1 Ellis & Blackb. 795; 18 Eng. Law & Eq. 422].

[2] Post, § 435; Stevenson *v.* Mortimer, Cowp. 806. In this case Lord Mansfield said: "The ground of the nonsuit at the trial was, that this action could not be well maintained by the plaintiffs, who are the owners of the vessel in question, but it ought to have been brought by the master, who actually paid the money. That ground, therefore, makes now the only question before us; as to which, there is not a particle of doubt. Qui facit per alium facit per se. Where a man pays money by his agent, which ought not to have been paid, either the agent or principal may bring an action to recover it back. The agent may, from the authority of the principal; and the principal may, as proving it to have been paid by his agent." See also Bickerton *v.* Burrell, 5 M. & Selw. 383.

[3] Ante, §§ 36, 116, 266–268, 294, 295, 298, 299; Coppin *v.* Craig, 7 Taunt. 243; 1 Bell, Comm. 422 (4th ed.); Id. pp. 523–538 (5th ed.).

others, or not;[1] so that exclusive credit is ordinarily deemed to be given by them and to them; and they alone, therefore, are ordinarily entitled to maintain actions on such contracts.[2] This doctrine is in conformity to the general usage of trade; and it was, in all probability, originally derived from it, as affording a just exposition of the intentions of all parties, and as being founded in public policy and convenience, and in the safety, if not the necessities, of commerce.[3]

§ 401. The same doctrine has been applied, with some modifications, to the case of domestic factors. The latter are, by the usages of trade, treated as principals, although not as exclusive principals (for the real principal may sue and be sued on the contracts of his factor); and this without any distinction, whether, in making the contract, they are known to be acting as factors or not; whether they act under a *del credere* commission or not.[4] In every contract so made by them, they are entitled to sue, and may be sued, as principals.[5]

§ 401 *a*. The case of factors, both foreign and domestic, affords an equally striking illustration of the fourth class of cases. Where factors are employed to sell goods, they are understood to be special owners, to be entitled to the management, control, and possession of the goods, and to have full authority to sell them (as indeed they usually do) in their own names.[6] Where they are employed to buy goods, similar considerations apply. They become personally liable to pay for them (although their principal may also be liable); and

[1] Ante, §§ 268, 290. and the authorities there cited; Post, §§ 423, 448; 1 Bell, Comm. § 209 (4th ed.); Id. p. 491 (5th ed.); Addison *v.* Gandasequi, 4 Taunt. 574; Thomson *v.* Davenport, 9 B. & Cressw. 78.

[2] Ante, §§ 268, 290; Post, § 423; 3 Chitty on Com. & Manuf. 302, 303; See Taintor *v.* Prendergast, 3 Hill, 72; [Wilson *v.* Zulueta, 14 Q. B. 405].

[3] Ibid. It seems to have been held in Taintor *v.* Prendergast, 3 Hill, 72, 73, that the agent is liable equally, whether his principal be a foreigner or not, if he does not disclose his principal, unless exclusive credit has been given to the agent. Ante, § 268; Trueman *v.* Loder, 11 Adolph. & Ellis, 589; Kirkpatrick *v.* Stainer, 22 Wend. 244.

[4] Ante, §§ 34, 110–112, 161, 162, 266, 268, 290, 293; Houghton *v.* Mathews, 3 Bos. & Pull. 485, 489; Leverick *v.* Meigs, 1 Cow. 645, 663, 664; 3 Chitty on Com. & Manuf. 201, 202; 2 Bell, Comm. §§ 417, 418 (4th ed.); p. 491 (5th ed.).

[5] Ante, §§ 34, 110–112, 161, 162, 266, 268, 290, 293; Houghton *v.* Mathews, 3 Bos. & Pull. 485, 489; Sadler *v.* Leigh, 4 Camp. 195; Girard *v.* Taggart, 5 Serg. & R. 27; Smith on Merc. Law, B. 1, ch. 5, § 6, pp. 138, 139 (3d ed. 1843); [Miller *v.* Lea, 35 Md. 396; Groover *v.* Warfield, 50 Ga. 644].

[6] Ante, §§ 34, 110–112, 161, 266, 268, 290, 293.

they have a right to the possession of them, and a special ownership in them.[1] In both cases they have also a lien on them, or their proceeds, for their commissions, disbursements, and advances touching them, as well as a lien for their general balance of accounts, subject to the exceptions already stated.[2] They may also maintain suits in their own name for trespasses and torts committed on all goods, while in their possession as factors, founded upon their special ownership and rights therein.[3]

§ 402. But although agents are thus entitled, in a variety of cases, to maintain actions upon contracts made for, or on behalf of, their principals, whether known or unknown; yet the right thus conferred upon them is not unlimited, either in regard to their principals, or in regard to the other contracting parties. Subject to the exceptions, which will be presently stated,[4] this right of agents is subordinate to, and controllable by, their principals; and in favor of the other contracting parties, this right is also modified, so as not to work any injustice or wrong to them.[5] Both parts of this proposition may require some illustration; and then the exceptions will naturally follow.

§ 403. In the first place, then, the right of agents is subordinate to, and controllable by, their principals.[6] Wherever the principal, as well as the agent, has a right to maintain a suit upon any contract, made by the latter, he may generally supersede the right of the agent to sue, by suing in his own name.[7] So, the principal may,

[1] Ante, §§ 39, 110–112, 161, 162, 266, 268, 290, 293; 3 Chitty on Com. & Manuf. 210, 211.

[2] Ante, §§ 34, 372, 373, 376, 377, 379; Post, § 407; 3 Chitty on Com. & Manuf. 210, 211; 2 Bell, Comm. §§ 799–802 (4th ed.); Hudson *v.* Granger, 5 B. & Ald. 27, 32–34.

[3] Williams *v.* Millington, 1 H. Bl. 81; Smith on Merc. Law, 77 (2d ed.); Id. B. 1, ch. 5, § 6, pp. 138, 139 (3d ed. 1843); Post, § 415.

[4] Post, §§ 407–410.

[5] Smith on Merc Law, 77 (2d ed.); Id. B. 1, ch. 5, § 6, pp. 138, 139 (3d ed. 1843); Atkyns *v.* Amber, 2 Esp. 493; Ante, §§ 160, 161, 269, 270.

[6] Post, §§ 410, 429.

[7] Sadler *v.* Leigh, 4 Camp, 194; Taintor *v.* Prendergast, 3 Hill, 72, 73; Girard *v.* Taggart, 6 Serg. & R. 27. In the case of Sadler *v.* Leigh, the contract was made with a factor, for the purchase of goods for his principal. The latter afterwards became bankrupt. Lord Ellenborough held, that the factor was a good petitioning creditor, under the bankrupt laws, for the debt. But, it appearing, that after the purchase, there had been a communication between the principal and the purchaser, whereby the former agreed to consider the latter as his debtor, and he had taken steps for recovering the debt directly from the purchaser, Lord Ellenborough held, that the factor's right was gone.

by his own intervention, intercept, suspend, or extinguish the right of the agent under the contract; as, if he makes other arrangements with the other contracting party, or waives his claims under it, or receives payment thereof, or in any other manner discharges it.[1] This, indeed, results from the general principle of law, that every man may waive rights, or extinguish rights, the benefit whereof exclusively belongs to himself; and, that, whatever rights are acquired by an agent are acquired for his principal. "Quicquid acquiritur servo, acquiritur domino.[2] Quilibet potest renunciare juri, pro se introducto."[3] Of course, this doctrine is applicable only to cases of pure agency, where the agent has no lien or other interest, or superior right in the property. If he has any, to the extent of such lien, and other interest and right, he is entitled to protection against the principal.[4]

§ 404. In the next place, in respect to the rights of the other party, with whom the agent has contracted. If the suit is brought in the name of the agent, instead of the principal, upon any contract knowingly made by the former for the latter, the other contracting party will generally be entitled to make the same defence, and establish the same claims against the agent, that he would be entitled to, if the suit were brought in the name of the principal.[5] Thus, for example, if a sale of goods is made by an auctioneer, or other agent, notoriously for his principal, the purchaser may, if he has no notice of any claims or demands of the agent upon the principal, make payment to the principal; and his payment will be available in a suit brought by the auctioneer, or other agent, notwithstanding any latent claims or liens which the auctioneer or agent may have; for it is his duty in such a case to make his claims known to the

He said: "This last fact, I think, is fatal to the petitioning creditor's debt. After the intervention of the principal, the right of the factor to sue was gone. The debt was then due to the principal, in the same manner, as if the sale had been made personally by him in the first instance." Ante, §§ 160, 161, 269, 270.

[1] See Coppin *v.* Walker, 7 Taunt. 237; Coppin *v.* Craig, 7 Taunt. 243; Morris *v.* Cleasby, 1 M. & Selw. 576; Walker *v.* Russ, 2 Wash. Cir. 283; 3 Chitty on Com. & Manuf. 201-203.

[2] 15 Viner, Abridg. 327; Co. Litt. 117 *a*.

[3] 2 Inst. 183; Wingate, Maxims, p. 483.

[4] Ante, §§ 371, 372.

[5] Atkyns *v.* Amber, 2 Esp. 493; 3 Chitty on Com. & Manuf. 201-203, 211; Smith on Merc. Law, 77 (2d ed.); Id. pp. 135, 136, 139 (3d ed. 1843); Leeds *v.* The Marine Ins. Co. 6 Wheat. 565, 570, 571; Taintor *v.* Prendergast, 3 Hill, 72; Post, §§ 419, 420.

purchaser, otherwise the latter may fairly presume, that a payment to the principal will be a just fulfilment of his contract.[1] So, in the like case, if the purchaser has a set-off against the principal, and has bought in reference to that claim, he may set off the claim in a suit brought by the agent, with the same effect, as if it were brought by the principal.[2] So, if the purchaser has purchased of the agent upon the just belief, authorized by the facts of the case, that he is the real principal, he may avail himself of any set-off, which he has against the agent, as well as the principal, in any suit brought by the latter upon the contract; for, in such a case, he will be entitled to avail himself of the like set-off, if the suit is in the name of the principal.[3]

§ 405. The same doctrine applies to other matters of defence. Thus, if a suit is brought by an agent upon a negotiable note, given to him for the benefit of his principal, the maker, or other party sued, may avail himself of the same defects of title, such as fraud, or want of consideration, as if the principal had brought the suit in his own name;[4] for, although, in such a case, the agent is entitled to sue, yet, if he claims no beneficial interest in the note, and has acquired no lien on it for advances or otherwise, he is treated as a naked holder, asserting the mere rights of his principal, and is affected by the same equities as the latter.[5]

[1] Coppin *v.* Walker, 7 Taunt. 237; Coppin *v.* Craig, 7 Taunt. 243; 3 Chitty on Com. & Manuf. 211.

[2] Coppin *v.* Walker, 7 Taunt. 237; Coppin *v.* Craig, 7 Taunt. 243; Stewart *v.* Aberdein, 4 Mees. & Wels. 218, 219, 228; 3 Chitty on Com. & Manuf. 201–203; Leeds *v.* Marine Ins. Co. 6 Wheat. 565, 570.

[3] George *v.* Clagett, 7 T. R. 359; Rabone *v.* Williams, 7 T. R. 360, note (*a*); Stracey *v.* Deey, 7 T. R. 361, note; Baring *v.* Corrie, 2 B. & Ald. 137. See also Lime Rock Bank *v.* Plimpton, 17 Pick. 159; Leeds *v.* Marine Ins. Co. 6 Wheat. 565, 570. See 2 Smith's Select Cases, 77, and note, 79, 80; Warner *v.* McKay, 1 Mees. & Wels. 595; Post, § 419. [And if no limitation of an agent's authority to sell was disclosed to the buyer, a set-off of a debt due from the agent is a good defence to a claim by the principal against the buyer, even though the agent was under an agreement with his principal not to sell in his own name. *Ex parte* Dixon, L. R. 4 Ch. D. 133; Borries *v.* Imperial Ottoman Bank, L. R. 9 C. P. 38. But where one buys from an agent the goods of his principal under a misapprehension not induced by the principal, that the goods belong to the agent, he cannot, in a suit brought by the owner of the goods for their value, claim as payment a credit given by him to the agent on an individual debt of the latter. Brown *v.* Morris, 83 N. C. 251. See, to same effect, Stewart *v.* Woodward, 50 Vt. 78. — Ed.]

[4] Ante, §§ 227, 228; Solomons *v.* Bank of England, 13 East, 135, n.; De la Chaumette *v.* Bank of England, 9 B. & Cressw. 208; s. c. 2 B. & Adolph. 385.

[5] Ibid.

§ 406. The doctrine has been carried a step farther. For, if an auctioneer, or other agent, should avowedly contract with another for the purchase of property for a third person, as the agent of the latter, when in fact he is himself the real principal, he will not only not be permitted to escape thereby from any defence to a suit, brought in his own name upon the contract; but he will not be allowed to maintain any suit in his own name on the contract as principal, without giving notice, before bringing the suit, of his real character in the transaction; for, otherwise, the vendor may be taken by surprise, and may be prevented from taking steps to avoid the suit, which he might have taken, if he had been apprised of all the facts.[1]

[1] Bickerton *v.* Burrell, 5 M. & Selw. 383. On this occasion Lord Ellenborough said: "This is an action founded upon a contract made by the plaintiff in the character of agent to an individual, named by him as principal; and the question is upon the plaintiff's title to sue. In the ordinary transactions of commerce, a man may sell or purchase in his own name; and yet it does not follow that the contract is his; but the transaction is open to explanation, and others, who do not appear as parties to the contract, are frequently disclosed, and step in to demand the benefit of it. But where a man assigns to himself the character of agent to another, whom he names, I am not aware that the law will permit him to shift his situation and declare himself the principal, and the other to be a mere creature of straw. That, I believe, has never yet been attempted. Now, on the face of this agreement, it is stated that the plaintiff made the purchase, paid the deposit, and agreed to comply with the conditions of sale for Richardson, and in the mere character of agent. Is not this account of himself to be taken *fortissime contra proferentem;* that is, that he was really treating in the character which he assigned to himself at the time of the purchase? And has not the defendant, with whom the plaintiff dealt as agent, a right still to consider him as such, notwithstanding he would now sue in the character of principal? Supposing that he might, under a different state of circumstances, have entitled himself to sue in his own name; surely the defendant ought to have had notice of the plaintiff's real situation before he is subjected to an action at the plaintiff's suit, and while it was open to him to make a tender. It was proposed to call Mrs. Richardson to prove that she had no interest in the transaction; and a reason was assigned why her name appeared in it, namely, that the purchase was intended for her benefit. Admitting this to be so, yet the question still occurs, whether a man who has dealt with another in the character of agent, is at liberty to retract that character without notice, and to turn round and sue in the character of principal. As to which, it appears to me, that the defendant ought at least to have an opportunity of knowing, by means of a specific notice, before he is dragged into a court of justice, the real situation in which the plaintiff claims to stand, in order that he may judge how to act. In the present case, *non constat* but that the defendant would have tendered the money. It was the plaintiff's fault originally, that he misled the defendant by assuming a situation which did not belong to him; and, therefore, he was bound to undeceive the defendant before bringing an action. This seems to follow from a consideration of what the

§ 407. Such is the general rule applicable to this subject; but, as has been already suggested, it is liable to exceptions, founded upon the same considerations of reciprocal equity and justice as the general rule itself.[1] The rule, properly and primarily, has its due

common principles of justice demand, which accord with the cases decided upon this subject. I recognize the authority of the Duke of Norfolk *v.* Worthy, which was merely the case of an undisclosed principal at the time of sale. Dr. Bethune's case is of like import; and it has been settled in many cases that a principal, when disclosed, may step in and exercise his own rights. But it is wholly without precedent, I believe, and as it seems to me, contrary to justice, that a person who has exhibited himself as agent for another should at once throw off that character and put himself forward as principal, without any communication or notice to the other party." [But see Rayner *v.* Grote, 15 Mees. & Wels. 359. In this case the plaintiff made a written contract for the sale of goods, in which he describes himself as the agent of A., and the buyer accepted and paid the price of a portion of the goods, and then had notice that the plaintiff was himself the real principal, and not the agent of A. It was decided that the plaintiff might sue in his own name for the non-acceptance of and non-payment for the residue of the goods. On the other hand it has been expressly adjudged, that a person who contracts as agent for an unknown and *unnamed* principal, may himself sue as principal, if he was in fact such, unless it appear that the other party relied on his character, as being only an agent, and would not have contracted with him as principal if he had known him to be such. Schmalz *v.* Avery, 16 C. B. 655. — R.] [In Winchester *v.* Howard, 97 Mass. 303, the plaintiff sued for a pair of oxen sold to the defendant by S., the plaintiff's agent. The defendant offered to prove that S. concealed his agency, and then, in answer to the defendant's inquiries, made representations tending to induce him to believe that the oxen were the property of S. himself, and not of the plaintiff; and agreed that the defendant might drive them home, and that he would give the defendant a bill of sale of them the next day, or that the defendant might drive them back, if he did not find things as S. had told him; and that having discovered the same evening that the plaintiff claimed to own them, the defendant the next day drove them back. In holding that this evidence was improperly rejected, Chapman, J., said: " The court are of opinion that it should have been left to the jury, in this case, to determine whether the minds of the parties really met upon any contract; and, if so, what the contract was. It is true that an agent may sell the property of his principal without disclosing the fact that he acts as an agent, or that the property is not his own; and the principal may maintain an action in his own name to recover the price. If the purchaser says nothing on the subject, he is liable to the unknown principal. Huntington *v.* Knox, 7 Cush. 371. But, on the other hand, every man has a right to elect what parties he will deal with. As was remarked by Lord Denman in Humble *v.* Hunter, 12 Q. B. 311: 'You have a right to the benefit you contemplate from the character, credit, and substance of the person with whom you contract.' There may be good reasons why one should be unwilling to buy a pair of oxen that had been owned or used or were claimed by a particular person, or why he should be unwilling to have any dealings with that person; and, as a man's right to enter into a contract is absolute, he is not obliged to submit the validity of his reasons to a court or jury." — G.]

[1] Ante, § 402.

operation, where the agent, entering into the contract, is the mere representative of the principal, and has acquired no interest, or lien, or other claim under it, in virtue of his agency; for, if he has acquired any such interest, lien, or other claim, then, to the extent thereof, he is entitled to protection, as well against the principal as against the other contracting party.[1] Thus, for example, a factor or other agent has a lien on the goods intrusted to him for sale, for his commissions and advances, and when he has sold the goods, this lien will attach upon the price in the hands of the purchaser; and to this extent the factor, or other agent, may insist upon payment from the purchaser to himself, in opposition to the claims of the principal, and also of the purchaser against the principal.[2] But, to

[1] 3 Chitty on Com. & Manuf. 211; Post, § 424; Smith on Merc. Law, 77 (2d ed.); Id. pp. 135, 136, 139 (3d ed. 1843); Drinkwater *v.* Goodwin, Cowp. 251, 255; Morris *v.* Cleasby, 1 M. & Selw. 576; Hudson *v.* Granger, 5 B. & Ald. 27, 32–34. If he is an agent acting under a *del credere* commission, he has an undoubted right to sue, so as to protect himself from liability under his guaranty. And the principal cannot displace his rights, without, at the same time, waiving the guaranty. See 1 Liverm. on Agency, 226, 227 (ed. 1818); Schrimshire *v.* Alderton, 2 Str. 1183; Houghton *v.* Mathews, 3 Bos. & Pull. 489; Morris *v.* Cleasby, 1 M. & Selw. 576.

[2] 3 Chitty on Com. & Manuf. 211; Ante, §§ 34, 372–379, 401; Post, § 424; Smith on Merc. Law, 77 (2d ed.); Id. B. 1, ch. 5, § 6, p. 139 (3d ed. 1843); Drinkwater *v.* Goodwin, Cowp. 251, 255; Hudson *v.* Granger, 5 B. & Ald. 27, 32–34. Lord Mansfield, in delivering the opinion of the court, in the case of Drinkwater *v.* Goodwin, Cowp. 251, 255, said: "The maxim of law, which says, that it shall not be in the power of any man, by his election, to vary the rights of two other contending parties, is a very wise maxim, as well as a very fortunate one for the parties who are so disputing; because by giving notice to such person to hold his hand, and offering him an indemnity, he renders himself liable to the true owner, if after such notice he takes upon himself to decide the right. And, therefore, though the purchaser of goods from a factor has a right to pay him the money, and be discharged; yet, when the principal and factor have a dispute, the buyer, with notice of such dispute, has no right to prejudice the title of the principal. This case, therefore, is in the nature of a bill of interpleader. The defendant is the stakeholder, the assignees and Jeffries are contending, and the court is to decide. Jeffries claims the money, as having a lien on it, and the assignees claim it, as standing in the place of the bankrupt. Jeffries claims it, as having a lien. To consider the case, therefore, first, upon the general question, we think that a factor who receives cloths, and is authorized to sell them in his own name, but makes the buyer debtor to himself; though he is not answerable for the debts, yet he has a right to receive the money. His receipt is a discharge to the buyer, and he has a right to bring an action against him to compel the payment; and it would be no defence for the buyer in that action to say, that, as between him and the principal, he (the buyer) ought to have that money, because the principal is indebted to him in more than that sum; for the principal himself can never

entitle the factor, or other agent, in such a case, to this privilege, he must give notice thereof to the purchaser, before the latter has made payment to the principal; or, if the purchaser insists upon a set-off against the principal before such right of set-off has attached to the transaction.[1] In short, the purchaser is entitled to protection, then, and then only, when he has no notice of the claim of the factor, or other agent, and has acted in good faith, and has acquired rights by the transaction, superior to, and inconsistent with, those of the factor or agent. *A fortiori*, this principle will apply, where the purchaser is guilty of a gross concealment of his claim upon the principal, which has, in fact, operated as a fraud upon the factor or other agent.[2]

§ 408. It is upon this same ground, that, when a factor, or other agent, has a lien for advances, or otherwise, to the full extent of the price or value of the goods of his principal, sold by him, he is entitled to receive payment of the proceeds from the purchaser, not only in opposition to his principal, but in opposition to his assignees, in case of his bankruptcy;[3] for, although the bankruptcy of the principal operates as a revocation of the authority of the factor, or other agent, yet it cannot operate to defeat or destroy his lien.[4] In truth, in such a case the factor, or other agent, has a complete power to dispose of the whole of such proceeds as he may please, as his own property, against the principal and his assignees. Therefore, if he is indebted to the purchaser of the goods in an equivalent amount, he may set off the one debt against the other, with the assent of the purchaser, and it will be a complete payment and extinguishment of

say that, but where the factor has nothing due to him. There is no case in law or equity, where a factor, having money due to him to the amount of the debt in dispute, was ever prevented from taking money for cloths in his hands." From the language of the court in this case, it has been inferred, that the agent cannot maintain a suit of this sort without first giving, or offering to give, an indemnity to the other contracting party. It may, perhaps, deserve consideration, whether this is absolutely indispensable; since the factor, or agent, by his contract, acquires a right to sue as the primary contracting party. An indemnity is, without doubt, ordinarily tendered; and, if not offered, the case may properly be deemed a case for a bill of interpleader in equity. Post, § 409.

[1] Drinkwater *v.* Goodwin, Cowp. 251, 255; Coppin *v.* Walker, 7 Taunt. 237; Coppin *v.* Craig, 7 Taunt. 243; Atkyns *v.* Amber, 2 Esp. 493; 3 Chitty on Com. & Manuf. 211.

[2] Atkyns *v.* Amber, 2 Esp. 493.

[3] Hudson *v.* Granger, 5 B. & Ald. 27, 32–34; Ante, § 407.

[4] Ibid.; Ante, § 349; Post, §§ 482, 483.

the price, so as to bar any action therefor, by the principal or his assignees.[1]

§ 409. From what has been already said, it follows, as a natural consequence, that if the purchaser of goods from a factor, or other agent, who has a lien thereon, should, after notice thereof by the factor, or other agent, pay over the money to the principal, he will, nevertheless, be liable to the factor, or other agent, for the same, and the payment will be no defence in an action brought therefor against him. In some of the authorities the qualification is added, that the purchaser should not only have notice, but should have an indemnity or offer of indemnity, from the factor, or other agent, to protect him against a suit by the principal.[2] But it seems at least a questionable point, whether there is any principle of law which positively requires such an indemnity, or offer of indemnity.[3]

§ 410. It also follows, from the premises, that, subject only to these special rights of the factor, or other agent, the principal may, in all cases, assert his own general rights over every contract of purchase and sale, made on his behalf in the course of the agency.[4] Hence he may recover from the purchaser of goods, under a sale made by his agent, the residue of the price, deducting the entire claim of his factor, or other agent.[5] So, if he extinguishes or satisfies the entire claim of his factor, or other agent, his right to recover the whole price is unquestionable, and cannot be resisted by the other contracting party, unless upon equities, which attach to the transaction against the principal, or the agent, or against both. Payments, also, made by the purchaser, will, subject to the like exceptions, operate as an extinguishment, *pro tanto*, of the debt, as indeed has been already suggested.[6]

§ 411. Similar principles apply to matters of defence by an agent, who is sued upon any contract upon which he becomes personally responsible, as well as his principal. Thus, for example, if a factor is employed to buy goods, and he purchases them in his own name, not disclosing any other principal, and he has in his own right a set-off against the seller, he may avail himself of it in a suit brought against him by the seller.[7] So, if he sells goods under

[1] Hudson *v.* Granger, 5 B. & Ald. 27, 32–34; Ante, § 407; Post, § 424.
[2] Drinkwater *v.* Goodwin, Cowp. 251.
[3] Ibid. But see Ante, § 407, note.
[4] Ante, §§ 402, 403.
[5] Ante, § 403; [Huntington *v.* Knox, 7 Cush. 374].
[6] Ante, § 407.
[7] This seems to be a natural result from the reciprocal right of the buyer, in

the like circumstances, he may set off the price of the goods against a debt, personally due from himself to the purchaser, at least if the principal does not interpose against it.[1]

§ 412. In respect to the rights of agents to maintain actions upon contracts made personally with them, there is another exception, founded upon motives of public policy, which should here be noticed. We have already seen that public agents are not ordinarily personally liable upon any contracts made by them, in their official character or otherwise, for or on behalf of the government.[2] A reciprocity exists upon the like contracts in favor of the other party. As public agents are not ordinarily suable, so they cannot ordinarily sue thereon. Thus, for example, where a naval officer shipped seamen for the public service on board of a public ship, and took a contract from a surety for their rendering themselves on board at the proper time; it was held, that the government only, and not the officer, could sue on the contract.[3] So, where a bill of exchange was indorsed to the Treasurer of the United States, it was held, that it was competent for the United States, in their own name, to sue upon such indorsement, as having the sole interest in the property.[4] On the other hand, if a public agent should personally bind himself (as he may) by a contract for the benefit of the government, and thereby become personally liable to the other contracting party thereon, there he would have a reciprocal right to hold such other party personally liable to him on the same contract, for any breach thereof.[5]

§ 413. We may close this part of our subject by remarking, that although an agent (known to be such) is ordinarily entitled to receive payment of any debt, due to his principal, in the course of his agency, wherever that right results from the usage of trade, or from an express agreement, or from an implied authority, resulting from the course of dealing between the parties; yet, we are not to understand, that the agent thereby acquires any right to receive payment, except in the ordinary modes of business.[6] He has no right to

such a case, to set off a debt due to him from the factor, who does not disclose any principal. Ante, § 404.

[1] Morris *v.* Cleasby, 1 M. & Selw. 576, 579. [See Young *v.* White, 7 Beav. 506.]

[2] Ante, §§ 302–307.

[3] Bainbridge *v.* Downie, 6 Mass. 253.

[4] United States *v.* Dugan, 3 Wheat. 172, 180.

[5] Ante, §§ 306, 398.

[6] Ante, §§ 98, 103, 109, 181, 215; Post, §§ 429, 430; Thompson on Bills of Exchange, pp. 370–373 (2d ed. 1836). [He cannot receive a piano in payment

change the security of his principal for the debt, or to make himself the debtor to the principal for the like amount, in lieu of the person who owes the debt, without the consent of the principal, express or implied, to that effect. Thus, for example, if an agent has authority to receive for his principal a debt due from a third person to him, and the agent owes the like amount, or a greater, to such third person, he has no right to substitute himself as the debtor to his principal giving him credit for the amount, or to set off the debt, due by him to such third person, against the debt due by the latter to his principal. But there may be a usage of trade, or a particular dealing between the principal and agent, which would justify such a set-off. And, indeed, it is said to be a common usage between insurance brokers, and underwriters upon policies, thus to set off losses on policies; and for the broker then to charge himself with the amount of the losses, and to give credit to his principal therefor.[1]

§ 414. Let us now proceed to the second branch of our inquiry: In what cases agents acquire rights against third persons founded upon the torts of the latter, in the course of their agency. We have

of a debt where he is only authorized to receive money, Bertholf *v.* Quinlan, 68 Ill. 297: nor wheat, Aultman *v.* Lee, 43 Iowa, 404. And the inference that an agent is authorized to collect a written security for a debt because it is in his custody, ceases when it has been withdrawn by the creditor; and if a debtor pay such claim to the agent, after the security for the debt has been withdrawn from his possession, he must show that the agent had authority to receive the payment. Guilford *v.* Stacer, 53 Ga. 618. — Ed.]

[1] Stewart *v.* Aberdein, 4 Mees. & Wels. 211, 228. On this occasion, Lord Abinger is reported to have said: "It must not be considered, that, by this decision, the court means to overrule any case, deciding, that, where a principal employs an agent to receive money, and pay it over to him, the agent does not thereby acquire any authority to pay a demand of his own upon the debtor, by a set-off in account with him. But the court is of opinion, that, where an insurance broker, or other mercantile agent, has been employed to receive money for another, in the general course of his business, and where the known general course of business is, for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits, in account with the debtors, with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases cannot properly be applied, but it must be understood, that, where an account is *bona fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention, and with the authority, of the principal." There is some mistake in the language attributed to Lord Abinger, in the first sentence above quoted, and he probably intended to state the reverse case from that which the language imports. I have given, in the text, what I presume was his real meaning. See Ante, §§ 98, 99, 103, 181; Barker *v.* Greenwood, 2 Younge & Coll. 414; Morris *v.* Cleasby, 1 M. & Selw. 576, 579.

already had occasion to remark, that factors and other agents, in virtue of their possession of the property of their principals, are entitled to maintain actions of trespass and trover against third persons for any torts or injuries, affecting that possession.[1]

§ 415. So, if an agent is induced, by the fraud, deceit, or misrepresentation of a third person, to purchase goods for his principal, or to sell goods for his principal, and thereby he sustains a personal loss, he will be entitled to maintain a suit against such third person for such wrongful act or deceit.[2] Thus, for example, if a factor should buy goods for his principal, which were falsely and fraudulently represented by the seller to be of a particular quality, or growth, or manufacture, which alone he was authorized to buy for his principal, and the principal should refuse to receive them, or the factor should be otherwise injured thereby, he would be entitled to a full recompense from the seller for the tort.[3]

§ 416. But, except in cases of this sort, or in cases of a kindred nature, the remedies in favor of agents against third persons for mere torts seem to be circumscribed within very limited boundaries. We may, therefore, dismiss this part of the subject with the following brief and general summary of the whole doctrine; that the remedy of agents for mere torts is confined to cases where their right of possession is injuriously invaded, or where they incur a personal responsibility, or loss, or damage in consequence of the tort.

[1] Solomons *v.* Bank of England, 13 East, 135, note; De la Chaumette *v.* Bank of England, 9 B. & Cressw. 208; Williams *v.* Millington, 1 H. Bl. 81. See Joseph *v* Knox, 3 Camp. 320; Smith on Merc. Law, 77 (2d ed.); Id. B. 1, ch. 5, § 6, p. 139 (3d ed. 1843); Burton *v.* Hughes, 2 Bing. 173; Rooth *v.* Wilson, 1 B. & Ald. 59; Story on Bailm. §§ 93, 152.

[2] Ante, § 401.

[3] See Ante, §§ 201, 398, 402.

CHAPTER XVI.

RIGHTS OF PRINCIPALS AGAINST THIRD PERSONS.

§ 417. We come, in the next place, to the consideration of the rights of principals, which are acquired by, and under, or in virtue of, any agency, against third persons. These rights are naturally divisible into two sorts; first, those which are acquired under the contracts made by their agents; and, secondly, those which are acquired on account of torts or injuries done to their property or rights in the course of the agency. Many of the topics belonging to this head have incidentally come under review in the discussions in the preceding pages. They will, therefore, be briefly examined in this place, with such further illustrations as their importance may require.

§ 418. And first, in relation to contracts. We have already seen, that the principal is bound by the acts and contracts of his agent, done with his consent, or by his authority, or adopted by his ratification.[1] In such cases, there arises a reciprocal obligation to the principal, on the part of the third person with whom such contracts are made, and for whose benefit, and with whose consent, such acts are done. In short, the general doctrine, in all such cases, is, that the principal, as the ultimate party in interest, is entitled, against such third persons, to all the advantages and benefits of such acts and contracts of his agents.[2]

§ 419. This doctrine applies, *a fortiori*, to every case where the

[1] Ante, §§ 147–154, 160, 161, 239, 242–244, 269, 270, 272; Seignior and Walmer's case, Godb. 360, 361; Routh *v.* Thompson, 13 East, 274; Hagedorn *v.* Oliverson, 2 M. & Selw. 485; Maclean *v.* Dunn, 4 Bing. 722; 3 Chitty on Com. & Manuf. 201–203; Bridge *v.* Niagara Ins. Co. 1 Hill, 247. [And see City Bank of Macon *v.* Kent, 57 Ga. 283; Taylor *v.* Chicago, &c. R. R. Co., 74 Ill. 86.]

[2] 3 Chitty on Com. & Manuf. 201; Grojan *v.* Wade, 2 Stark. 443; Small *v.* Atwood, 1 Younge, 407, 457. [Thus, a principal may sue in his own name on a promissory note, not negotiable, which is made for his benefit, although it is made payable to his agent. National Life Ins. Co. *v.* Allen, 116 Mass. 398. So, where an agent makes proof in his own name of his principal's claim against the estate of a decedent, the principal can come in as claimant and prove his right to the claim, although it has been attached as the property of

agent does not contract in his own name, but solely in the name of his principal; for, in such a case, the principal is not only a contracting party, but he is the sole contracting party exclusive of the agent, and is alone competent to sue or enforce any other remedy thereon.[1] In all cases of this sort, however, the principal, while he is entitled to all the advantages and benefits of the contract of his agent, must take them with all the attendant burdens, and subject to all the attendant just counter-claims and defences of the other contracting party.[2] Thus, if the contract of the agent is impeachable, on account of the fraud, imposition, misrepresentation, or other misconduct of the agent, the principal is affected with all the consequences thereof, and cannot avail himself of his own innocence, to support what would otherwise be an unfounded or defective title.[3] So, if the agent has sold goods in his own name, no other person being known as principal, and the agent agrees, at the time of the sale, that the vendee may set off against the price a debt due to him by the agent, that set-off will be as good against a suit brought by the principal, as it would be, if the suit was brought by the agent for the price.[4]

§ 420. Upon the same ground, liable to the like exceptions, the principal is ordinarily entitled to the same remedies against such third persons, in respect to such acts and contracts, as if they were made or done with him personally. Thus, for example, if goods are

the agent. Gage *v.* Stimson, 26 Minn. 64. And a corporation can sue upon a written contract in which it is mentioned as one of the contracting parties, although it is signed by the agents of the corporation in their own names only, and without words designating their agency. Lamson Manuf. Co. *v.* Russell, 112 Mass. 387. State of Wisconsin *v.* Torinus, 26 Minn. 1. — Ed.]

[1] Ante, §§ 261, 262.

[2] Ante, §§ 402–404. [But this rule would not allow a purchaser of goods, bought of an agent, but in fact belonging to a foreign principal, to plead a discharge in bankruptcy to an action by such principal, which would have been a good bar, had the agent been the real principal; at least, not when the fact was disclosed to the purchaser, that the goods belonged to a foreign principal, although his name was not given. Ilsley *v.* Merriam, 7 Cush. 242.]

[3] 3 Chitty on Com. & Manuf. 202, 203, 208. [And where a member of a firm makes a settlement with an insurance company for loss by fire, which was procured by the fraud of an agent of the company, the firm must restore what was received under the settlement before bringing suit upon the policy. Brown *v.* Hartford Fire Ins. Co., 117 Mass. 479. See Southern Express Co. *v.* Palmer, 48 Ga. 85. — Ed.]

[4] Ante, §§ 237, 403, 404; Post, § 444; Westwood *v.* Bell, 4 Camp. 349; Stracey *v.* Deey, 7 T. R. 361, note; George *v.* Clagett, 7 T. R. 359, 361; Rabone *v.* Williams, 7 T. R. 360, note (*a*); [Young *v.* White, 7 Beav. 506].

bought or sold by an agent, the principal may maintain an action in his own name upon the contract, for the price or for the delivery of the goods.[1] The rule (it is said) equally applies, whether the principal be a foreign, or a domestic principal.[2] It will not make any difference, that the agent may also be entitled to sue upon the contract; for, as we have seen in a great variety of cases, the agent and the principal have each a several right to sue on the same contract, the rights of the latter being in general, and subject to the exceptions already stated, paramount to those of the former.[3] Neither will it make any difference, in such cases, that the agent is a factor, acting under a *del credere* commission;[4] nor that the principal, at the time of entering into the contract, is unknown or unsuspected;[5] nor that the third person has dealt with the agent, supposing him to be the sole principal.[6] The only effect of the last consideration is, that the principal will not be permitted to intercept the rights of such third person in regard to the agent; but he must take the contract, subject to all equities, in the same way as if the agent were the sole principal.[7] Thus, for example, if the agent is the only known or supposed principal, the person dealing with him will be entitled to the same right of set-off, as if the agent were the true and only prin-

[1] Ante, §§ 110, 161, 269, 270, 272, 402, 403; Brewster *v.* Saul, 8 La. 296.

[2] Taintor *v.* Prendergast, 3 Hill, 72.

[3] Ante, §§ 269, 270, 410, 411.

[4] Ante, §§ 110, 161; 270, 272; Leverick *v.* Meigs, 1 Cowen, 645, 663-665, 670; 3 Chitty on Com. & Manuf. 201, 202.

[5] Ante, § 270; Taintor *v.* Prendergast, 3 Hill, 72; Small *v.* Atwood, 1 Younge, 407, 452. On this occasion Lord Lyndhurst said: "Where a contract is entered into by a person as agent for another, though it is not known that he is contracting in the character of agent at law, an action may be maintained either in the name of the agent or in the name of the principal; and, in a court of equity, I apprehend it is perfectly clear, that where a contract is entered into by an agent in his own name, but really on behalf of other persons, it is necessary that those other persons, as being interested in the subject-matter of the suit, should be, in some shape or other, parties to the contract." [Nicoll *v.* Burke, 78 N. Y. 581; Ilsley *v.* Merriam, 7 Cush. 242.]

[6] Ante, §§ 266, 267, 291-294; 3 Chitty on Com. & Manuf. 201, 202; Smith on Merc. Law, B. 1, ch. 5, § 5, pp. 134, 135 (3d ed. 1843); Brewster *v.* Saul, 8 La. 296; Williams *v.* Winchester, 19 Martin, 22; Leverick *v.* Meigs, 1 Cow. 645, 663-665; Hicks *v.* Whitmore, 12 Wend. 548; Walter *v.* Ross, 2 Wash. Cir. 283; Grojan *v.* Wade, 2 Stark. 443; 2 Kent, Comm. Lect. 41, p. 632 (4th ed.); [Shurr *v.* Cass, L. R. 5 Q. B. 656; Everett *v.* Drew, 129 Mass. 150; Bryant *v.* Wells, 56 N. H. 153; Stoddard *v.* Ham, 129 Mass. 383].

[7] Smith on Merc. Law, 73, 84 (2d ed.); Id. B. 1, ch. 5, § 5, pp. 134, 135 (3d ed. 1843); Coates *v.* Lewes, 1 Camp. 444; Gibson *v.* Winter, 5 B. & Adolph. 96; 2 Kent, Comm. Lect. 41, p. 632; (4th ed.); Ante, §§ 390, 404, 407, 419, 420.

cipal.[1] But, subject to these rights, and those of the agent himself, the principal may generally sue upon such a contract, in the same manner as if he had personally made it.

§ 421. This doctrine is of high antiquity in the common law; and it is so entirely consonant to natural and reciprocal justice, that it probably had its foundation in the earliest rudiments thereof. It was recognized in an early case, where the principal had authorized his servant to compound and settle a debt with the debtor, and the debtor made a composition and settlement with the servant, and promised the latter to pay the balance; and it was held, that the principal might maintain an action in his own name upon the promise.[2] So, the principal may sue upon a contract made by his servant for labor and services, if he originally authorized the servant to make the contract, or subsequently ratified it; at least if, at the time, the other contracting party knew that the servant was not

[1] Smith on Merc. Law, 74, 75 (2d ed.); Id. B. 1, ch. 5, § 5, pp. 134, 135 (3d ed. 1843); Coates *v.* Lewes, 1 Camp. 444; Ante, §§ 390, 404, 407, 419, 420; Stracey *v.* Deey, 7 T. R. 361, note; Carr *v.* Hinchliff, 4 B. & Cressw. 547; Taylor *v.* Kymer, 3 B. & Adolph. 320; Baring *v.* Corrie, 2 B. & Adolph. 137; Gibson *v.* Winter, 5 B. & Adolph. 96; 3 Chitty on Com. & Manuf. 201-203; Taintor *v.* Prendergast, 3 Hill, 72; [Young *v.* White, 7 Beav. 506; Traub *v.* Milliken, 57 Me. 63].

[2] Seignior and Walmer's case, Godb. 360; 3 Chitty on Com. & Manuf. 201. In Seignior and Walmer's case (Godb. 360), Mr. Justice Dodderidge said: "An assumpsit to the servant for the master is good to the master; and an assumpsit, by the appointment of the master of the servant, shall bind the master, and his assumpsit. 27 Ass. If my baily of my manor buy cattle to stock my grounds, I shall be chargeable in an action of debt; and, if my baily sell corn or cattle, I shall have an action of debt for the money; for, whatsoever comes within the compass of the servant's service, I shall be chargeable with, and likewise shall have advantage of the same. If a servant selleth a horse with warranty, it is the sale and contract of the master, but it is the warranty of the servant, unless the master giveth him authority to warrant it; for a warranty is void which is not made and annexed to the contract; but there it is the warranty of the servant, and the contract of the master. But if the master do agree unto it after, it shall be said, that he did agree to it *ab initio*. As, where a servant doth a disseisin to the use of his master, the master not knowing of it, and then the servant makes a lease for years, and then the master agrees, the master shall not avoid the lease for years; for now he is in, by reason of his agreement, *ab initio*. When the servant promiseth for the master, that the master shall forbear to sue, &c., and shall by such a day deliver to the defendant the obligation, &c., and the defendant promiseth to pay the money at such a day; and the master, having notice thereof, agreeth to it, it is now the promise of the master *ab initio;* for it is included in his authority, that he should agree, compound, &c., and he hath power to make a promise." Judgment in the principal case was given for the plaintiff. But see Ante, §§ 59, 132.

acting *sui juris*, or if he afterwards had notice thereof from the principal, before the price of the labor and service were paid to the servant.[1]

§ 422. There are exceptions, indeed, to this doctrine, most of which have been already alluded to, where the principal can neither sue nor be sued upon the very contract made by his agent, although it has been made by his authority, or in the course of the agency.[2] Thus, if the instrument is under seal, and is exclusively made between the agent and the third person, — as, for example, if it is a charter-party or bottomry bond, made by the master of a ship in the course of his employment, — the principal can neither sue nor be sued thereon, although he may be bound thereby, and may be entitled to collateral rights and remedies growing out of it.[3]

§ 423. Another exception is, where an exclusive credit is given to and by the agent; and, therefore, the principal cannot be treated

[1] Paley on Agency, by Lloyd, 339. Mr. Lloyd's note on this subject deserves to be cited. Mr. Paley, in his text, had said: "Whether a master may bring an action for the recovery of his servant's earnings, seems to be a point unsettled." (See Co. Litt. 117 *a*, Mr. Hargrave's note.) Mr. Lloyd then adds: "There would not, however, it is apprehended, be much difficulty in deciding such a point when it arose. The question would be, first, Was the transfer of service originally made with the master's assent? if not, it seems clear that the master might, by subsequently adopting the act, maintain an action for work and labor done by his servant. If yes, there is then the further question, whether the servant, in that particular employment, was to be considered as the servant of his original master, or that of the person immediately employing him. And it is submitted, that, if the master were liable for wages to the servant during the period of the substituted employment, the inference would arise, that he still considered the servant as his own, and did not intend to waive the benefit of his earnings. But, if, by previous agreement, he were released from a proportionate amount of wages, then the contrary conclusion would be the more reasonable. If payment have been made to the servant, in ignorance that he was the servant of another, probably in that case the employer would be discharged."

[2] Ante, §§ 160, 160 *a*, 161, 162, note, 278, 294; Handford *v.* McNair, 9 Wend. 54; Blood *v.* Goodrich, 9 Wend. 68.

[3] Ante, §§ 158, 160, 160 *a*, 161, 162, 273, 276–278, 294; Post, § 450; Shack *v.* Anthony, 1 M. & Selw. 573; Abbott on Shipp. Pt. 3, ch. 1, § 2, pp. 163, 164 (Amer. ed. 1829). See Tilson *v.* Warwick Gas Company, 4 B. & Cressw. 962, 968, per Bayley, J.; Fletcher *v.* Gillespie, 3 Bing. 635; Ersk. Inst. B. 3, tit. 3, §§ 47–49; Dubois *v.* Delaware and Hudson Canal Co. 4 Wend. 285; Hall *v.* Bainbridge, 1 Mann. & Gr. 42. [See Mahoney *v.* McLean, 26 Minn. 415. And where a deed was made to an agent in his own name under seal, in which no mention was made of the principal, but the other party knew that the principal was interested, and had himself received part payment from him, it was held that the principal could not be sued on the covenants contained in the deed. Pickering's Claim, L. R. 6 Ch. 525. — Ed.]

as in any manner whatsoever a party to the contract, although he may have authorized it, or may be entitled to the benefit of it. Thus, a foreign factor, buying or selling goods, is ordinarily treated, as between himself and the other party, as the sole contracting party; and the real principal cannot sue or be sued on the contract.[1] This is a general rule of commercial law, founded upon the known usage of trade; and it is strictly adhered to, for the convenience and safety of foreign commerce.[2]

§ 424. Another exception is, where the agent has a lien or claim upon the property bought or sold, or upon its proceeds, which is equal to or exceeds the amount or value thereof; for, in such a case (as we have seen), the rights of the agent are paramount to those of the principal; and the principal has no right to sue thereon, unless with the consent of the agent; and, if he does sue, and the other party has received notice of the lien, the suit will be ineffectual, or at the peril of the party sued.[3] If any other doctrine were to prevail, the right of lien of the agent might be defeated at the mere will of the principal.

§ 425. The differences, in these respects, between our law and the Roman law, have already, in some measure, come under our notice;[4] but it may not be without use to present some of them a little more fully in this place. By the Roman law, as it originally stood, the principal could not ordinarily sue or be sued on the contract made through the instrumentality of his agent; but the latter was generally treated as the proper and sole contracting party.[5] This was subsequently altered by the edicts of the prætor, so far as it respected the rights of third persons to institute suits against the principal, in cases falling within the reach of the exercitorial and institorial actions.[6] But the exercitorial action did not lie in favor

[1] Ante, §§ 268, 279, 290, 400; Post, § 448; [Roosevelt *v.* Doherty, 129 Mass. 301].

[2] Ante, §§ 268, 279, 290, 400; Thomson *v.* Davenport, 9 B. & Cressw. 87; Paterson *v.* Gandasequi, 15 East, 62; Addison *v.* Gandasequi, 4 Taunt. 574; Smith on Merc. Law, 66 (2d ed.); Id. pp. 122, 123 (3d ed. 1843).

[3] Ante, §§ 393, 397, 407, 408.

[4] Ante, §§ 163, 261, 271.

[5] Ante, §§ 163, 261, 271. Pothier, after quoting the doctrine of Paulus in the Digest, "Per procuratorem non semper acquirimus actiones" (Dig. Lib. 3, tit. 3, l. 72), adds, in a note: "Dicet, non semper; quia, ut mox videbitur, actio utilis interdum nobis ex contractu procuratoris accommodatur; quod est contra principia juris, quæ non permittunt aliquid acquiri per personam juri nostro non subjectam." Pothier, Pand. Lib. 3, tit. 3, n. 9, marg. note (1).

[6] Ante, §§ 163, 261, 271; Dig. Lib. 14, tit. 1, l. 1; Id. tit. 3, l. 1; Pothier,

of the owner or employer (*exercitor*) against the other party contracting with the master. He was not, however, without a remedy; for, if there was a contract of hire with the master, the owner or employer might recover the hire in a direct action, *ex locato;* if there was a gratuitous contract, he might maintain an action *ex mandato.* So the Digest has declared. "Sed ex contrario, exercenti navem adversus eos, qui cum magistro contraxerunt, actio non pollicetur, quia non eodem auxilio indigebat; sed aut ex locato cum magistro, si mercede operam ei exhibet; aut si gratuitam, mandati agere potest." [1]

§ 426. The institorial action was also, in its terms, apparently limited to suits against the principal. "Æquum prætori visum est, sicut commodo sentimus ex actu institorum, ita etiam obligari nos ex contractibus ipsorum, et conveniri." [2] But no like action lay against the other contracting party by the principal. However, he was not without remedy, since, by a cession of the right of action from the institor, he might, in some cases, maintain a suit founded thereon against the other party. "Sed non idem facit circa eum, qui institorem præposuit, ut experiri possit. Sed si quidem servum proprium institorem habuit, potest esse securus, adquisitis sibi actionibus. Si autem vel alienum servum, vel etiam hominem liberum, actione deficietur; ipsum tamen institorem, vel dominum ejus convenire poterit, vel mandati, vel negotiorum gestorum." [3] It is added: "Marcellus autem ait, debere dari actionem ei, qui insti-

Pand. Lib. 14, tit. 1, n. 10, 11, 18; Id. Lib. 14, tit. 3, n. 1, 9, 10, 17, 18; Ersk. Inst. B. 3, tit. 3, §§ 43, 46.

[1] Dig. Lib. 14, tit. 1, l. 1, § 18; Pothier, Pand. Lib. 14, tit. 1, n. 18, and Pothier's note (1). Pothier says: "Scilicet, ut magister ipsi suas cedat actiones." He adds, in another place, speaking of the case of Institors: "Eadem equitas occurrit, ut hoc casu detur etiam actio exercitori versus eum, qui cum magistro navis contraxit." Pothier, Pand. Lib. 14, tit. 3, n. 4, marg. n. (3). See also Pothier, Pand. Lib. 14, tit. 1, n. 18, where he says that, in cases of owners of provision ships, a broader right is allowed. "Solent plane præfecti propter ministerium annonæ, item in provinciis presides provinciarum, extra ordinam eos juvare ex contractu magistrorum." Pothier, Pand. Lib, 14, tit. 1, n. 18, citing Dig. Lib. 14, tit. 1, l. 1, § 18. He then adds, in a note (3): "Exercitores navium ad annonam inservientium. Cæteris autem exercitoribus non datur actio adversus eos, qui cum magistro contraxerunt; nisi forte eo casu, quo aliter rem suam servare non possent;" and he then refers to Pothier, Pand. Lib. 14, tit. 3, n. 4.

[2] Dig. Lib. 14, tit. 3, l. 1; Pothier, Pand. Lib. 14, tit. 3, n. 1.

[3] Dig. Lib. 14, tit. 3, l. 1; Pothier, Pand. Lib. 14, tit. 3, n. 4, 17. Pothier adds in his note (2 to n. 4): "Ut actionem ex hoc contractu Institoris, sive in cujus potestate Institor est, quæsitam cedat."

torem præposuit, in eos, qui cum eo contraxerint."[1] And Gaius held, that the principal might maintain the suit, if he could not otherwise vindicate his right: "Eo nomine, quo institor contraxit, si modo aliter rem suam servare non potest."[2]

§ 427. In special cases, also, where the contract, made through an agent, was declared to be directly obligatory between the principal and the other contracting party (as, for example, in case of a sale), the principal might maintain a direct action thereon. Thus the Digest puts it: "Si procurator vendiderit, et caverit emptori; quæritur, an domino, vel adversus dominum, actio dari debeat? Et Papinianus (Lib. 3, Responsorum) putat, cum domino ex empto agi posse utili actione, ad exemplum institoriæ actionis, si modo rem vendendam mandavit; ergo et per contrarium dicendum est, utilem ex empto actionem domino competere."[3]

§ 428. But, except in these and a few other cases, the general rule seems to have prevailed in the Roman law, that reciprocal actions lay, in cases of agency, only between the direct and immediate parties thereto.[4] The modern nations of continental Europe seem, with great wisdom, to have adopted the general doctrine of allowing reciprocal actions between the principal and the other contracting parties, wherever it is not excluded by the nature or by the express terms of the contract.[5]

§ 429. The rights of principals against third persons, arising from the acts and contracts of their agents, may be further illustrated by the consideration of payments made to or by the latter. And, first, in relation to payments made to agents. Such payments are good,

[1] Dig. Lib. 14, tit. 3, l. 1; Pothier, Pand. Lib. 14, tit. 3, n. 4.

[2] Dig. Lib. 14, tit. 3, l. 2; Pothier, Pand. Lib. 14, tit. 3, n. 4.

[3] Dig. Lib. 19, tit. 1, l. 13, § 25; Pothier, Pand. Lib. 3, tit. 3, n. 9, and marg. note (3).

[4] Pothier, Pand. Lib. 3, tit. 3, n. 9, marg. note (1); Ante, §§ 163, note 1, 261, 272, 425; Ersk. Inst. B. 3, tit. 3, §§ 43, 46. [There were actions, not specified in the text, which could be brought by the principal against the other contracting party, and still other actions which could be brought by that party against the principal. The difference between the Roman and the English, or the continental, European, law as to reciprocal actions between the contracting parties is more apparent than real. See Ortolan, Explication Historique des Instituts, vol. 3, §§ 1553–1557. While the assertion of Poste in his Commentary on Gaius, that "the Roman law of agency had become identical with the system we find established in modern Europe," is too broad a statement, still the impression conveyed by the text of its great deficiency in point of remedy is certainly erroneous. — G.]

[5] Ante, §§ 163, 261, 272; Pothier on Oblig. n. 72, 82, 447, 448; 1 Stair, Inst. B. 1, tit. 12, § 16; Ersk. Inst. B. 3, tit. 3, §§ 43–47.

and obligatory upon the principal, in all cases where the agent is authorized to receive payment, either by express authority, or by that resulting from the usage of trade, or from the particular dealings between the parties.[1] In such cases the maxim of the Roman law is justly applied: "Quod jussu alterius solvitur, pro eo est, quasi ipsi solutum esset."[2] But the principal may intercept such payment, by giving notice to the debtor not to pay to the agent before the money is paid; and, in such a case, if the agent has no superior right, from a lien or otherwise, any subsequent payment made to the agent will be invalid, and the principal may recover the money from the debtor.[3]

§ 430. The modes and circumstances, under which such payments are made to the agent, may also have a material bearing on the rights of the principal. If the payments are received by the agent, according to the ordinary course of business, or even if they are made out of the ordinary course of business, if the agent alone is known, or is supposed to be the principal, and the debtor has no notice of any claim by the real principal, the latter will be bound thereby.[4] But, if the transaction is on behalf of a known principal,

[1] Ante, §§ 98, 99, 181, 413; Post, § 440; Smith on Merc. Law, 67, 68 (2d ed.); Id. B. 1, ch. 5, § 4, pp. 124, 125 (5th ed. 1843); Ante, §§ 98, 181, 215, 413; Post, § 451; Baring *v.* Corrie, 2 B. & Ald. 137; Favenc *v.* Bennet, 11 East, 36; Morris *v.* Cleasby, 1 M. & Selw. 576, 579. Payment to a sub-agent will sometimes bind the agent, so as to make him responsible to his principal for any loss of the money in the hands of the sub-agent. Taber *v.* Perrott, 2 Gall. 565; Ante, § 231 *a*. [But unless a principal has held his selling agent out to the buyer as having authority to collect claims, a payment made to such agent by the buyer will not be good against the principal. Clark *v.* Smith, 88 Ill. 298. So, where an attorney had an account to collect for his principals, and the debtor made a payment to a person in the attorney's office, who gave the debtor a receipt in the name of the attorney, but did not pay the amount received to the attorney, it was held that the principal was not bound by such payment. O'Connor *v.* Arnold, 53 Ind. 203. — Ed.]

[2] Dig. Lib. 50, tit. 17, l. 180; Pothier on Oblig. by Evans, n. 470 (n. 505 of the French editions).

[3] Ante, §§ 112, 402, 403, 407; Favenc *v.* Bennet, 11 East, 36; Morris *v.* Cleasby, 1 M. & Selw. 576, 579; Powell *v.* Nelson, cited 15 East, 65; Scrimshire *v.* Alderton, 2 Stra. 1182; Mann *v.* Forrester, 4 Camp. 60; Stewart *v.* Aberdein, 4 Mees. & Wels. 218, 225, 228; Corlies *v.* Cumming, 6 Cowen, 181, 186.

[4] Ante, §§ 98, 106, 109, 181, 215, 413; Favenc *v.* Bennet, 11 East, 38; Coates *v.* Lewes, 1 Camp. 444; Blackburn *v.* Scholes, 2 Camp. 341, 343; Morris *v.* Cleasby, 1 M. & Selw. 576, 579; 1 Liverm. on Agency, 226-232 (ed. 1818); Smith on Merc. Law, 74, 75 (2d ed.); Id. B. 1, ch. 5, § 4, pp. 124, 125, 135, 136 (3d ed. 1843); De Valingin's Adm'r *v.* Duff, 14 Peters,

or the principal is afterwards disclosed, no subsequent payment but such as is strictly authorized by the usual course of business, or by the particular usage of trade, or by the express or implied authority of the principal, will bind him; and, if made otherwise, the principal may, notwithstanding, recover the amount from the debtor.[1]

282. Hence it is, that if the principal be unknown and undisclosed, the agent may vary the terms of the contract, and receive payment in any manner he may please, since he acts as and is supposed to be the principal. Blackburn *v.* Scholes, 2 Camp. 341, 343. In Stewart *v.* Aberdein, 4 Mees. & Wels. 211, 218, which was a case where an insurance broker had received payment of a loss by a set-off with the underwriters, according to usage, Lord Abinger, at nisi prius, in summing up, expressed his opinion, "that the notion had been pushed too far about the actual payment in cash; and that it appeared to him, that, if one man has to pay another money on account of his principal, and there is money due to him from such other person, it makes no difference to the principal, whether there is an interchange of bank-notes, or a mere transfer of accounts from one side to the other; and that it is equally a payment if it is done without fraud. He, however, left the whole facts to the jury, and directed them to consider, whether parties, effecting insurance for their own benefit through an agent, must not know what is the habit of dealing between the broker and underwriter, and whether the authority to settle must not mean, that the broker should settle in the same way as is the custom to settle with underwriters." The court held his direction right. Ante, § 429, note. See also Carr *v.* Hinchliff, 4 B. & Cressw. 547; Gibson *v.* Winter, 5 B. & Adolph. 96.

[1] Townsend *v.* Inglis, Holt, N. P. 278; Stewart *v.* Aberdein, 4 Mees. & Wels. 218, 228; Ante, §§ 98, 181, 410, 413, 429. [So, where an agent of a corporation was permitted to transact business in behalf of the corporation, and was held out to a purchaser and to the world generally as an agent with general powers, it was held that payments to such agent bound the corporation. Howe Machine Co. *v.* Ballmeg, 89 Ill. 318. See Drinan *v.* Nichols, 115 Mass. 353; Swett *v.* Southworth, 125 Mass. 417; Kinsman *v.* Kershaw, 119 Mass. 140. And payments made to an agent without authority to receive them, will bind the principal unless repudiated by him without delay. As, where an agent for the sale of safes took in part payment for one an old safe which the principal received, and thereupon forwarded the new one, the part payment was held valid. Harris *v.* Simmerman, 81 Ill. 413. But the payment to an agent by the transfer to him of a piano was held not to bind the principal, as he repudiated the transaction the next day. Bertholf *v.* Quinlan, 68 Ill. 297; Aultman *v.* Lee, 43 Iowa, 404. So, where a contract is made with an agent, in ignorance of the fact that he is not the principal, payments for work done by him before notice of his agency, are good as against a claim made by the real principal. Peel *v.* Shepherd, 58 Ga. 365; Eclipse Windmill Co. *v.* Thorson, 46 Iowa, 181. But where a debtor paid money to a third person, as the agent of his creditor, and afterwards, under protest, paid the debt again to the creditor, it was held that he could not recover the money he paid the supposed agent, from the creditor, for if he was really the agent, it was but a payment of his debt, and if he was not the agent, the creditor was not liable. Clowdes *v.* Hannibal, &c. R. R. Co., 71 Mo. 510. But where an agent authorized to receive the payment of a debt in money, receives

§ 431. Secondly, in relation to payments made by agents for their principals. In these cases, any mode of payment by the agent, accepted and received as such by the other contracting party, as an absolute payment, will discharge the principal, whether he be known or unknown, and whether it be in the usual course of business, or not.[1] Thus, for example, if a factor, or other agent, should be employed to purchase goods for his principal, or should be intrusted with money to be paid for his principal, and the creditor or seller should take the note of the factor or agent, payable at a future day, as an absolute payment, the principal would be entirely discharged from the debt, and the creditor, having thus given exclusive credit to the factor or agent, would have no remedy except against the latter.[2] The question, in most cases of this sort, is not, generally, so much a question of law, as of fact; that is to say, whether the note is received as a conditional payment, or as an absolute payment; whether it is received with the knowledge, that there is another principal, or not; and whether there is an exclusive credit given to the agent or not.[3]

§ 432. On the other hand, in all cases of this sort, where exclusive credit is given to the agent, or an absolute payment is acknowledged, either by receiving a security, or otherwise, the agent has a right to substitute himself to the creditor, and to recover

payment thereof in Confederate money, it was held that the debtor is discharged from liability to the principal for the debt. Maloney *v.* Stephens, 11 Heisk. 738. So, where notice of the revocation of an agent's authority to receive payment of a debt has not been communicated to a debtor, the latter can pay to the agent the amount due the creditor, and will be thereby discharged from any liability. Packer *v.* Hinckley Locomotive Works, 122 Mass. 484; Insurance Co. *v.* McCain, 96 U. S. 84; Braswell *v.* Am. Life Ins. Co., 75 No. Car. 8; Ulrich *v.* McCormick, 66 Ind. 243; Meyer *v.* Hehner, 96 Ill. 400; Rice *v.* Barnard, 127 Mass. 241; Underwood *v.* Nicholls, 17 C. B. 239. — Ed.]

[1] Post, § 440; [Mink *v.* Morrison, 42 Mich. 567].

[2] Chitty on Com. & Manuf. 204; Ante, §§ 266–268, 287–300; Seymour *v.* Pychlau, 1 B. & Ald. 14, 17–19; Strong *v.* Hart, 6 B. & Cressw. 160; Smith *v.* Ferrand, 7 B. & Cressw. 19; Marsh *v.* Pedder, 4 Camp. 257; [Anderson *v.* Hillies, 10 Eng. Law & Eq. 497].

[3] Seymour *v.* Pychlau, 1 B. & Ald. 14; Ante, §§ 290, 291, 293, 296, 297; Strong *v.* Hart, 6 B. & Cressw. 160; Smith *v.* Ferrand, 7 B. & Cressw. 19; Porter *v.* Talcott, 1 Cowen, 359, 383, 385; Johnson *v.* Weed, 9 John. 310; Everett *v.* Collins, 2 Camp. 515; Corlies *v.* Cumming, 6 Cowen, 181, 187; Muldon *v.* Whitlock, 1 Cowen, 290, 303–305; Schermerhorn *v.* Loines, 7 John. 311; Cheever *v.* Smith, 15 John. 276; Tapley *v.* Martens, 8 T. R. 451; Marsh *v.* Pedder, 4 Camp. 257; Jaques *v.* Todd, 8 Wend. 83; Lincoln *v.* Battelle, 6 Wend. 475; Tobey *v.* Barber, 5 John. 68; Pentz *v.* Stanton, 10 Wend. 271.

the amount from his principal, in the same manner, although not in the same form of action, as if it had been actually paid by him. Therefore, if an insurance broker, by the usage of business, or by the agreement of the parties, is exclusively liable to the underwriters for the premium, and they credit him therefor accordingly, he is entitled to recover the amount from his principal, even though he has not actually paid the money to the underwriters.[1] But this doctrine is confined to cases where it results from the usage of

[1] See Seymour *v.* Pychlau, 1 B. & Ald. 14; Power *v.* Butcher, 10 B. & Cressw. 329. On this latter occasion, Mr. Justice Bayley said: "This is an action by the assignees of an insurance broker, for work and labor, and premiums, against the defendants, who are ship-owners, and had employed the broker to effect certain policies on their behalf, which he did effect with a company of which he was a member. Now, according to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not, in the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. But, as between the assured and the underwriter, the premiums are considered as paid. The underwriter, to whom, in most instances, the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middle-man between the assured and the underwriter. But he is not solely agent; he is a principal to receive the money from the assured, and to pay it to the underwriters. In this case, the policies were not in the ordinary form, but by deed, and the broker covenanted to pay the premiums to the underwriters; and in consideration of that covenant the policies were effected. The underwriters, therefore, took a covenant from the broker to pay the premium, instead of acknowledging the receipt of the premium, as they do in the ordinary case of a policy by simple contract. In such a case, the action would be maintainable at the suit of the broker, on the principle, that he was entitled to call upon the assured for the payment of those premiums which he had become liable to pay to the underwriters, and which they had acknowledged the receipt of. The assured have had the benefit of the policies; and, if the underwriters were liable upon the risk, they were warranted in calling upon the broker to pay the premiums. In point of justice, the assured ought to pay the broker, or, in the event, which has happened, of his failure, his assignees. In an ordinary case, the assurers would have no claim upon the assured for the premium, because, by the policy, they acknowledge the receipt of it. Here there is no such acknowledgment, and, therefore, it may be said, the assurers may claim the premiums from the assured. A contract cannot be raised by implication of law, except in the absence of an express contract. Now, here there was an express contract between the underwriters and the assured, through the agent, and by that contract, the underwriter agreed to look to the broker alone for the premiums. The assured have had the same benefit from the policies, as if the premiums had been advanced to the underwriters at the moment when the policies were effected. Then, it is necessary to consider in what situation the broker stands, in order to ascertain whether he is not entitled to call upon the assured for the premiums. The underwriters have a claim upon him for the full amount of premiums; and, if that be so, he ought to recover those premiums from those persons who have had the benefit of the policies."

trade, or from the express or implied agreement of the parties. For, if a factor, or other agent, should buy goods for his principal in his own name, and on his own exclusive credit, payable at a future day, he would not be at liberty, as between himself and his principal (unless the purchase was agreed between them so to be made), to consider himself as the vendor, or to sue for the value of the goods before the expiration of the credit.[1]

§ 433. The doctrine may be carried further; for, if a creditor of the principal settles with the agent, and takes a note or other security from the latter, for the amount due by the principal, although, as between the parties, it is intended only as a conditional payment; yet, if the creditor gives a receipt, as if the money were actually received, or the security were an absolute payment, so that the agent is thereby enabled to settle, and does settle, with the principal, as if the debt had been actually discharged, and the principal would otherwise be prejudiced, the debt will be deemed, as to the latter, absolutely discharged.[2]

[1] Seymour *v.* Pychlau, 1 B. & Ald. 14, 16–18. This case was presented under somewhat peculiar circumstances. The purchase of the goods was made by an agent for a foreign merchant then in England. The agent gave his acceptances, payable at six months, for the amount. But the goods were known to be purchased for the foreign merchant, and the invoices were made out in his name. The agent brought an action against his principal for goods sold and delivered, before the acceptances became due, pending which suit he became bankrupt. The court held the action not maintainable. Lord Ellenborough said: "There is not one feature in the case, to show that the plaintiff was to buy in order to assume the character of seller to the defendant. The relation between the parties is this: the defendant, coming from Russia, wants the accommodation of a person in this country to become responsible for him; the defendant is to pay to the plaintiff a commission for the service done; when a person pays another a commission, such other person stands in the relation of factor or agent; but this commission is to be paid when he has performed the duty. What is the duty? to pay for the goods; then, if the defendant is now liable to the plaintiff for the debt, he does not derive the benefit intended to be earned by the payment of commission. Upon the latter point, there is not any pretence for saying, that the price is demandable *instanter*. Let us look at the reason of the thing: the defendant wants credit, and yet he is called upon to pay his agent immediately. The plaintiff was to pay by a bill at six months; when he has paid that bill, then he may sue the defendant, and not before. If it were otherwise, the plaintiff would be placed in a worse situation with respect to his agent, than he would with respect to the seller. I think, therefore, that, as there was not in this case any thing to import a contract of buying and selling, and as immediate payment was contrary to the nature of the thing, and the expectancy of the parties, and, as there was not any express stipulation to that effect, the plaintiff has failed in both points."

[2] 3 Chitty on Com. & Manuf. 204; Wyatt *v.* Marquis of Hertford, 3 East,

§ 434. Upon this ground, where work was done for the principal, and the account was presented to his steward, who gave his own check on a banker for the amount; and thereupon the creditor gave a receipt for the money on account of the principal; and, upon the dishonor of the check, the creditor accepted another draft for the amount, payable at a future time, from the steward; it was held, that, if the principal had, in the mean time, settled his accounts with his steward, or had dealt with him differently in consequence of that receipt, so that he would be prejudiced thereby, the principal would be discharged.[1] The same doctrine will apply to the case of a ship's-husband, or a shipmaster, contracting a debt for supplies, or for repairs of the ship, where an exclusive credit is originally given to him, or an absolute payment is afterwards acknowledged, by a receipt, upon a note or other security being given by such agent for the amount, whereby he is enabled to settle with, and to receive the amount, in credit or otherwise, from the owners.[2]

§ 435. The foregoing are cases where payments made by the agent are available for the principal, as being for his benefit. But payments may have been made by an agent injuriously to the principal; and the question often arises, under what circumstances the principal is entitled to recover back the money so paid. In the first place, he may recover it back, when the whole consideration fails; as in the case of a deposit upon account of a purchase, where the bargain is rescinded, or becomes incapable of being performed.[3] So, if an agent to insure pays a premium upon a policy to the underwriters, or they acknowledge on the policy, that they have received the premium, and the policy never attaches, the principal may recover back the premium from them.[4] In the next place, if an agent pays money, under a mistake of fact, for his principal, the latter may recover it back from the party who has received it.[5] In

147; Abbott on Shipp. Pt. 1, ch. 3, § 8, and note (1) to the Amer. ed. 1829, p. 76; Marsh *v.* Pedder, 4 Camp. 257; [Brown *v.* Bankers' and Brokers' Telegraph Co. 30 Md. 39].

[1] Wyatt *v.* Marquis of Hertford, 3 East, 147; Cheever *v.* Smith, 15 John. 276; Muldon *v.* Whitlock, 1 Cowen, 290, 303–305.

[2] Abbott on Shipp. Pt. 1, ch. 3, § 8, note (1) (Amer. ed. 1829); Reed *v.* White, 5 Esp. 122; Stewart *v.* Hall, 2 Dow, 29; Cheever *v.* Smith, 15 John. 276; Schermerhorn *v.* Loines, 7 John. 311; Muldon *v.* Whitlock, 1 Cowen, 290, 303–305.

[3] Duke of Norfolk *v.* Worthy, 1 Camp. 337, 339; Smith on Merc. Law, 75, 76 (2d ed.); Id. B. 1, ch. 5, § 4, pp. 124–126 (3d ed. 1843); Post, § 451.

[4] Dalzell *v.* Mair, 1 Camp. 532; Power *v.* Butcher, 10 B. & Cressw. 329.

[5] Ancher *v.* Bank of England, Doug. 637; Treuttell *v.* Barandon, 8 Taunt.

the next place, where money has been illegally extorted from an agent in the course of his employment, the principal may recover it back. Thus, for example, if his agent pays duties for which the goods are not liable, and the goods are withheld until the duties are paid, the principal may recover the amount back.[1] In the last place, where an agent has paid money, by some fraud or imposition practised upon him, and also where he himself has participated in a fraudulent payment to another person, cognizant of the fraud, the principal may recover it back.[2]

§ 436. Secondly, as to the rights of principals on account of torts or injuries done to their property or rights, in the course of the agency, by third persons. This may be very briefly disposed of. The tort or injury may be one in which the agent himself has been a party, as well as the third person; or it may be a tort or injury, in which the latter alone has acted, and is alone responsible. In the former case, the agent and the third person are jointly, as well as severally, liable to the principal; and he may sue both, or either of them.[3] In the latter case, the third person is liable to the principal, although he may also be liable for the tort to the agent.[4]

§ 437. We may illustrate these principles by a few cases. Thus, if an agent tortiously converts the property of his principal; as, if he sells or pledges it to a third person, without right or authority, the latter will generally be liable, equally with the agent, for the conversion.[5] This doctrine applies in all cases, where the third

100; Sigourney *v.* Lloyd, 8 B. & Cressw. 622; s. c. 5 Bing. 525; Ante, § 398. [So, where an agent of a bank holding a note of the bank procured other funds with it and paid a debt to M., it was held the bank could recover the money from M., as he had no legal right to the proceeds of the draft. Bank of Kansas City *v.* Mills, 24 Kan. 604. So, where money is paid under a mistake of the legal obligation of the principal. United States *v.* Bartlett, Daveis, 9. And where a disputed claim was presented to an agent in charge of the business and authorized to pay the debts of his principal, which claim was probably not enforceable by suit, but rested on moral obligation only, and the agent, with knowledge of all the material facts, compromised the claim by paying a smaller sum than was claimed to be due, it was held that the principal could not recover the sum paid. Bergenthal *v.* Fiebranz, 48 Wisc. 435.— ED.]

[1] Stevenson *v.* Mortimer, Cowp. 805; Elliott *v.* Swartwout, 10 Peters, 137; Ante, § 307.

[2] Clarke *v.* Shee, Cowp. 197; Taylor *v.* Plumer, 3 M. & Selw. 562; Ante, §§ 224, 229, 230.

[3] Taylor *v.* Plumer, 3 M. & Selw. 562.

[4] Ante, § 229.

[5] 3 Chitty on Com. & Manuf. 204–206; Clarke *v.* Shee, Cowp. 197; Ante, §§ 224, 229, 230.

person knew and participated in the illegal or unauthorized act of conversion. It also applies in all cases of a special agency (but not of a general agency), even though the third person was not cognizant of, or party to, the tort, but acted *bona fide*, and without notice.[1] Thus, if A., not being a general agent of B., sells a horse of B. to C., without due authority, or by an excess of authority, C., and every subsequent vendee under him, will be liable to B. for the conversion. But if A. were the general agent of B., although he violated his private orders, A. alone, and not C., or any subsequent vendee, would be liable for the conversion.[2]

§ 438. On the other hand, the agent may have conducted himself within the true scope of his duties, and the tort or injury may arise wholly from the misconduct of a third person. Thus, if a third person should wrongfully convert, or misuse, or injure the property of the principal, while it is in the possession of the agent, the principal may maintain an action in his own name against the wrongdoer, for damages for the tort. So, if, in the sale of goods to an agent, the seller has been guilty of a gross fraud, the principal may maintain an action for any loss which he has sustained thereby.

[1] Ante, §§ 228, 229; Taylor *v.* Plumer, 3 M. & Selw. 576; 3 Chitty on Com. & Manuf. 205, 206; McCombie *v.* Davies, 6 East, 538; Smith on Merc. Law, 74, 75 (2d ed.); Id. B. 1, ch. 5, § 4, pp. 124, 125 (3d ed. 1843); Anon. 12 Mod. 514; Baldwin *v.* Cole, 6 Mod. 212; Taylor *v.* Kymer, 3 B. & Adolph. 320. [A party has a right to rescind a contract where his agent and the party with whom the contract is made have had dealings with each other about the contract unknown to him, whereby his interests are injuriously affected; Panama Co. *v.* India Rubber Co., L. R. 10 Ch. 515: so, where the parties give the agent a written fictitious offer for the purchase of land, which the agent is trying to sell, in order to raise the price, and a portion of which raised price the agent is to retain for himself, the contract is invalid, Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 221; Reese River Silver Mine Co. *v.* Smith, L. R. 4 H. of L. App. Cas. 64: and where an agent empowered to sell land at a given price, sells it three years later at the same price, when the value of land has greatly advanced, without informing his principal of the rise in value, it was held to be such a fraud upon the principal, that a court of equity would refuse to enforce a conveyance to a *bona fide* purchaser, Proudfoot *v.* Wightman, 78 Ill 553: and a bank which pays out money on a check presented by the clerk of its depositor, who had been duly introduced at the bank as one authorized to transact the firm's business at the bank, but not to sign checks, is liable to the depositor for money paid to such clerk upon a forged check; Mackintosh *v.* Eliot Bank, 123 Mass. 393: but a merchant who has enabled his factor to raise money fraudulently can claim no redress against a party who has *bona fide* made advances on the goods, Vickers *v.* Hertz, L. R. 2 Scotch App. 113; and see Roach *v.* Turk, 9 Heisk. 708. — Ed.]

[2] Ante, §§ 73, 126–133; 3 Chitty on Com. & Manuf. 205, 206; Pickering *v.* Busk, 15 East, 38; [Thompson *v.* Barnum, 49 Iowa, 392].

So, if a master of a ship should let the ship to hire to a charterer, and the latter, having possession of the ship, should, by his misconduct on the voyage, cause the ship to be seized and confiscated by a foreign government, or should cause her to be lost or destroyed by his negligence, or should convert her to his own use, by going on other voyages, or by selling her; in all these cases the principal may maintain an action for the wrong.[1]

§ 439. In many cases of an illegal conversion of property by a third person, as well as by his agent, the principal may have an election of remedy; as, for example, in the case of a tortious sale, he may waive the tort, and maintain an action for the proceeds of the sale; or he may bring trover against the wrong-doer.[2] Sometimes the one course is more desirable than the other; but it is so, only when the interests of the principal may be enhanced thereby. Thus, if the wrong-doer has sold the goods of the principal for a high price, it will be most favorable to the latter to pursue his remedy for the price or proceeds. On the other hand, if the goods have been sold at an undervalue, then an action of trover would be the more beneficial remedy, as the principal would be entitled to recover the full price or value of the goods.

§ 440. We may close this head of inquiry by remarking, that the acts of agents, within the scope of the authority delegated to them, will enure to the benefit of the principal in a variety of cases, not falling under the preceding heads. In all such cases, the acts are treated as the acts of the principal, and are generally available for him, in the same manner and with the same effect as if personally done by himself; according to the old approved maxim, Qui per alium facit, per seipsum facere videtur.[3] Thus, as we have seen, payment by an agent is payment by the principal, and may be pleaded as such.[4] So, a demand by an agent, duly authorized by the principal, if he shows his authority, or his authority is admitted by the other side, is a demand by the principal, for the purpose of

[1] Ante, §§ 229–231; Hunter *v.* Prinsep, 10 East, 378, 394; Clarke *v.* Shee, Cowp. 197; [Southern Express Co. *v.* Palmer, 48 Ga. 85].

[2] Ibid. [And where a principal's property has been replevied by a writ against his agent or bailee, he can retake it by replevin from the plaintiff in the first action, even during the pendency of that action. White *v.* Dolliver, 113 Mass. 400. — Ed.]

[3] Co. Litt. 258; Branch, Max. (Amer. ed. 1824), p. 122; Smith on Merc. Law, 69 (2d ed.); Id. pp. 103, 104, 121, 122 (3d ed. 1843).

[4] Ante, § 431.

founding a right or an action for the principal.[1] In many cases, too, as we have seen, the subsequent ratification of an unauthorized act, such, for example, as a demand, or notice, or claim, of an unauthorized agent, will avail to bind the principal, as well as to confer rights upon him.[2] But this is true, only when the act is beneficial to the principal, and does not create an immediate duty on another party to do some other act, or does not subject the latter to some loss, damage, or injury; for then, if permitted, it would have a retroactive effect to defeat or control pre-existing rights, or to found duties, a compliance with which was not obligatory, or even justifiable, at the time, and, of course, which the law will not be so unreasonable as to encourage or establish.[3]

[1] Smith on Merc. Law, 73–75 (2d ed.); Id. B. 1, ch. 5, § 5, pp. 133, 134 (3d ed. 1843); Bothlingk *v.* Inglis, 3 East, 381; Roe *v.* Davis, 7 East, 363; Coore *v.* Callaway, 1 Esp. 115; Coles *v.* Bell, 1 Camp. 478, n.

[2] Ante, §§ 244, 245, 248, 249; Maclean *v.* Dunn, 4 Bing. 722; Wilson *v.* Anderson, 1 B. & Adolph. 450; Bartram *v.* Farebrother, 4 Bing. 579.

[3] Ante, §§ 245–247; 3 Chitty on Com. & Manuf. 206, 207; Solomons *v.* Dawes, 1 Esp. 83; Smith on Merc. Law, 73, 74 (2d ed.); Id. pp. 133–135 (3d ed. 1843); Doe *v.* Walters, 10 B. & Cressw. 626.

CHAPTER XVII.

RIGHTS OF THIRD PERSONS AGAINST PRINCIPALS.

§ 441. We next come to an inquiry into the rights of third persons against principals, arising either from the contracts, or the acts, or the torts of their agents. Many topics, which would arrange themselves for consideration under this head, have been unavoidably discussed in the preceding pages. The subject, therefore, will be briefly considered in this place; but, at the same time, as it will become indispensable to bring all matters touching it under review, in order to a complete examination of it, it will necessarily involve some repetitions.

§ 442. In the first place, then, as to the rights of third persons against principals, growing out of the contracts of their agents. It may be generally stated, that wherever an agent, having proper authority, makes a contract for or on behalf of his principal, that contract becomes obligatory on the principal; and the other contracting party has ordinarily the same rights and the same remedies against the principal, as if he had personally made the contract.[1] There are exceptions to this doctrine, founded upon special considerations, some of which will presently fall under our notice. The whole doctrine rests upon the maxim already referred to, Qui facit per alium, facit per se; and it is a plain and obvious dictate of nat-

[1] Smith on Merc. Law, 55–58 (2d ed.): Id. B. 1, ch. 5, § 4, pp. 103–108 (3d ed. 1843); 3 Chitty on Com. & Manuf. 201–205; 2 Kent, Comm. Lect. 41, pp. 629, 630 (4th ed.). See also Todd *v.* Emly, 7 Mees. & Wels. 427. [Where a party's servant retails whiskey in his presence and with his consent and approbation (he directing the purchaser to "go to Mary"), and on his premises, he was held to have given her authority to do so, and was responsible therefor. In the words of the court, "There is little doubt that the defendant was the deity of this rude shrine, and that Mary was only the ministering priestess." Forrester *v.* Georgia, 63 Ga. 349. So a principal is bound by the warranty in a deed made by his attorney to whom he has given power to sell and convey and execute all necessary deeds of conveyance. Bronson *v.* Coffin, 118 Mass. 156. See Slater *v.* Irwin, 38 Iowa, 261; Fletcher *v.* Sibley, 124 Mass. 220. — Ed.]

ural justice, that he who is to receive the benefit shall bear the burden; and that he who has acquired, through his agent, certain fixed rights and remedies upon the contract, against the other contracting party, shall be the latter.

§ 443. But the responsibility of the principal to third persons is not confined to cases where the contract has been actually made under his express or implied authority. It extends further, and binds the principal in all cases where the agent is acting within the scope of his usual employment, or has held out to the public, or to the other party, as having competent authority, although, in fact, he has, in the particular instance, exceeded or violated his instructions, and acted without authority.[1] For, in all such cases, where

[1] Ante, §§ 72, 105, 127, 128; Kerns *v.* Piper, 4 Watts, 222. [The defendant's manager, without authority to accept or draw bills, accepted a bill, and the defendant was held to be liable for the amount of the bill, on the ground that he had put the manager into a position which apparently gave him such authority, Edmunds *v.* Bushell, L. R. 1 Q. B. 97: so, where the defendant had allowed R. to act to all appearances as his agent for a long time, and to purchase goods for him, Kerslake *v.* Schoonmaker, 3 Thomps. & C. 524: so, where the proprietor of a hotel employed an agent in running the hotel, and held him out to the public as the manager, he was bound by such agent's purchases of supplies for the hotel on credit, Beecher *v.* Venn, 35 Mich. 466; Tozier *v.* Crafts, 123 Mass. 480: so, where a local agent of an insurance company made an oral contract of insurance, the company were bound by such contract, as they had held him out as having authority to make it. Putnam *v.* Home Ins. Co., 123 Mass. 324: so, where an agent of a railroad company, authorized to issue bills of lading, issued one on a forged warehouse receipt, and no goods were in fact received by the company, the latter was held bound by his act as within the scope of his authority, Armour *v.* Michigan Central R. R. Co. 65 N. Y. 111; Gallup *v.* Lederer, 1 Hun, 282; Rice *v.* Goffman, 56 Mo. 434; St. Louis, &c. Packet Co. *v.* Parker, 59 Ill. 23; Engh *v.* Greenbaum, 4 Thomp. & C. 426; Knight *v.* Luce, 116 Mass. 586: so, where B. was authorized by the owner of a horse to sell him for a fixed sum without further instructions, and B. warranted the horse, the owner was bound by the warranty. Tice *v.* Gallop, 5 Thomp. & C. 51; Newman *v.* British, &c. S. Co. 113 Mass. 362. And where the agent has a limited authority, but holds himself out as having a general authority, and disobeys his instructions, his principal will be bound by his acts, unless the party dealing with the agent knew his authority was limited. Home Life Ins. Co. *v.* Pierce, 75 Ill. 426; Fatman *v.* Leet, 41 Ind. 133. But it has been held that if the principal at once repudiates the disobedient act of his agent he will not be liable. Rafferty *v.* Haldron, 81½ Pa. St. 438; Turner *v.* Webster, 24 Kans. 38. And where the principal has not held the agent out as having authority to incur an indebtedness on his behalf, he is not made liable by false statements of the agent to parties with whom he deals as to the extent of his authority. Grover, &c. Machine Co. *v.* Polhemus, 34 Mich. 247. So, where a merchant in Memphis, at the breaking out of the war, left a clerk in charge of his business with directions to take no new business, he was held not to be liable for the actions of the clerk in undertaking to make collections, and in failing

one of two innocent persons is to suffer, he ought to suffer who misled the other into the contract, by holding out the agent as competent to act, and as enjoying his confidence.[1] We have already seen, that this doctrine applies to a large class of agencies, where the party acts under a general authority, as contradistinguished from a special authority.[2] To the other illustrations, we may add the case of the master of a ship. If he makes a particular engagement or warranty, relating to the conveyance of goods, according to the usual employment of the ship, the owners will be bound by such engagement or warranty, although it is made without their knowledge or approbation, or against their orders.[3] So, if the principal should clothe the agent although a mere special agent, with all the apparent muniments of an absolute title to the property in himself, the principal would be bound by the acts of the latter; as, for example, if he should clothe him with the apparent title to property by a bill of lading of a shipment, as by making the shipment appear to be on account of the agent, or should trust him with negotiable securities, indorsed in blank, a sale or disposal thereof by the agent, although in violation of his private orders, would bind the principal, and give correspondent rights and remedies to third persons, who become *bona fide* possessors under such sale, or other act of disposal, against him.[4]

to pay over the proceeds after collection. Jones *v.* Harris, 10 Heisk. 98. See Holloway *v.* Stephens, 2 Thomp. & C. 562. — ED.]

[1] Ante, §§ 17, 18, 73, 126, 127, 131–133, 227, 228; Post, § 470; Smith on Merc. Law, 56–59 (2d ed.); Id. B. 1, ch. 5, § 4, pp. 103–111 (3d ed. 1843); 3 Chitty on Com. & Manuf. 202, 203.

[2] Ante, §§ 17, 18, 73, 126–133, 227, 228; [Boynton *v.* Lynn Gas Co., 124 Mass. 197].

[3] Abbott on Shipp. Pt. 2, ch. 2, §§ 6–8, pp. 94–98 (Amer. ed. 1829); Ellis *v.* Turner, 8 T. R. 531; Ante, §§ 73, 126–133.

[4] Ante, §§ 34, note, 227, 228. [Thus, where a party represented himself to the insured as the agent of a certain insurance company, examined the property, and returned with the policy properly executed, and the insured accepted the policy and paid the premium to the party, who was in fact a mere broker and never paid over the premium to the company, it was held that the company was bound by the policy. Lycoming Fire Ins. Co. *v.* Ward, 90 Ill. 545. So, where M., who was employed to buy a horse, took the bill of sale in his own name, although he paid for it with his employer's money, and then sold the horse to a third party and absconded with the proceeds, it was held that his employer could not maintain trover against the purchaser for the value of the horse. Nixon *v.* Brown, 57 N. H. 34. So, where a merchant enables his factor to raise money fraudulently on his goods by giving up to the factor the delivery order, he can claim no redress against the party who has in good faith loaned money on the goods. Vickers *v.* Hertz, L. R. 2 Scotch Ap. 113. See President, &c. *v.* Cornen, 37 N. Y. 322; Lister *v.* Allen, 31 Md. 543. — ED.]

§ 444. So, upon similar grounds, the rights of third persons will be protected, where they deal with an agent, supposing him to be the sole principal, without any knowledge that the property involved therein belongs to another person. This has been already alluded to, in cases where purchases are made of a factor or other agent holding himself out as the principal, or supposed to be such, and the buyer has a set-off against such agent or factor.[1] In such cases, the set-off is equally good, whether a suit be brought in the name of the principal or of the factor or agent, for the price of the goods.[2] So, if an agent employed to collect money, and to remit it to his principal, should lend it to a person to whom he is indebted in a larger amount, the latter, if he has no knowledge that the money does not belong to the agent, may retain it as a set-off, and may resist a suit therefor by the principal, although notice of the claim of the principal is given to him before the suit is brought.[3] But, where an agent is known to be merely acting as such in the transaction, a third person, dealing with him with full notice, cannot avail himself of any right of set-off which he may have against the agent.[4]

§ 445. So, if a contract is originally made without the authority of the principal, he may, by a ratification of it, give it validity, so as to confer upon the other contracting party the same rights and remedies as if he had personally made it;[5] for, as we have seen,

[1] Ante, §§ 390, 404, 407, 419, 420.

[2] Ante, §§ 419, 420; Smith on Merc. Law, 74, 75 (2d ed.); Id. B. 1, ch. 5, § 5, pp. 135, 136 (2d ed. 1843); 3 Chitty on Com. & Manuf. 202; Morris v. Cleasby, 4 M. & Selw. 566; George v. Clagett, 7 T. R. 359; Pickering v. Busk, 16 East, 38; Whitehead v. Tuckett, 15 East, 400.

[3] Lime Rock Bank v. Plimpton, 17 Pick. 159.

[4] Hurlburt v. Pacific Ins. Co. 2 Sumner, 471. But where the principal has parted with all beneficial interest in any property, the agent cannot make a valid sale thereof, nor a valid contract in respect thereto, so as to bind the principal, although the latter still retain the legal title. Thus, although the registered owner of a ship would be liable *prima facie* for repairs done thereon, this presumption may be rebutted by proof that he has parted with the beneficial interest. Jennings v. Griffiths, Ryan & Mood. 42; McIver v. Humble, 16 East, 169; Curling v. Robinson, 7 Mann. & Gr. 339; [Young v. White, 7 Beavan, 506].

[5] Ante, §§ 239–260; Smith on Merc. Law, 60 (2d ed.); Id. p. 108 (3d ed. 1848). [And such a ratification may be inferred from the actions of the principal. Thus, where A. agrees to furnish B. with lumber which he buys of C., representing himself, without authority, as the agent of B., and the lumber is shipped to B. with a bill from C. to B., and the latter receives it without notifying C. that he was buying from A., it was held that he was liable to C. Bearce v.

the general maxim is, that a subsequent ratification is equivalent to a prior authority: "Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur."[1] This is so regularly true, that if an agent purchases goods for his principal without due authority, and signs a written contract therefor, and the contract is within the statute of frauds, yet, if the principal subsequently ratifies it, the ratification will make the contract good within the statute of frauds, so as to bind the principal.[2]

§ 446. The liability of the principal to third persons upon contracts made by his agent, within the scope of his authority, is not varied by the mere fact, that the agent contracts in his own name, whether he discloses his agency or not, provided the circumstances of the case do not show that an exclusive credit is given to the agent.[3] Thus, if an agent purchases goods in his own name for his principal, without disclosing the latter, the principal will be liable, when discovered, to the vendor, for the price.[4] So, if the agent

Bowker, 115 Mass. 129. So, where an agent sold some mules and warranted them, and his principal afterwards ratified the sale by accepting the note given for the purchase-money, he was held to be bound by the warranty. Cochran *v.* Chitwood, 59 Ill. 53. And where a broker, without authority, procured a charter upon a vessel, and so informed the owner, it was held that the latter's silence, and the fact that he did not disaffirm the transaction, was evidence of a ratification of the charter. Saveland *v.* Green, 40 Wisc. 431. So, where a servant of the defendants made a settlement for them by which he received a wagon from the debtor, which he sold, retaining the amount due the company, and paying the balance to the debtor, and he informed the president of the defendant corporation of the terms of the settlement, who made no objection thereto, and the wagon turned out to be the property of some other party, it was held in an action of trover brought by the latter, that the defendants were liable for the value of the wagon. Dunn *v.* Hartford, &c. Horse R. R. Co., 43 Conn. 434; Summerville *v.* Hannibal, &c. R. R. Co., 62 Mo. 391; St. Louis, &c. Packet Co. *v.* Parker, 59 Ill. 23; Spooner *v.* Thompson, 48 Vt. 259; Cooper *v.* Schwartz, 40 Wisc. 54; Sartwell *v.* Frost, 122 Mass. 184. — ED.]

[1] Maclean *v.* Dunn, 4 Bing. 722; Smith on Merc. Law, 60; Id. p. 108 (3d ed. 1843); Co. Litt. 207 *a*; Ante, §§ 239-260 (2d ed.).

[2] Ante, § 244; Maclean *v.* Dunn, 4 Bing. 722; Soames *v.* Spencer, 1 Dowl. & Ryl. 32; Smith on Merc. Law, 59, 60 (2d ed.); Id. pp. 108, 133, 134 (3d ed. 1843); [Remick *v.* Sanford, 118 Mass. 102].

[3] 1 Bell, Comm. § 418 (4th ed.); Id. B. 3, ch. 3, pp. 491, 492 (5th ed.); Ante, §§ 147, 269, 270; Meeker *v.* Claghorn, 44 N. Y. 349; [Christoffersen *v.* Hansen, L. R. 7 Q. B. 509; Kerchner *v.* Reilly, 72 N. C. 171].

[4] Ante, §§ 266-270, 420; Smith on Merc. Law, 65, 66 (2d ed.); Id. B. 1, ch. 5, § 5, pp. 133, 134 (3d ed. 1843); Paterson *v.* Gandasequi, 15 East, 62; Addison *v.* Gandasequi, 4 Taunt. 574; Railton *v.* Hodgson, 4 Taunt. 576, n.; Wilson *v.* Hart, 7 Taunt. 295; Thomson *v.* Davenport, 9 B. & Cressw. 78, 86, 88; Bickerton *v.* Burrell, 5 M. & Selw. 383; Jones *v.* Littledale, 6 Adolph. &

purchases the goods, and states, at the time, that he purchases as agent, but does not disclose the name of his principal, the latter will not be absolved from the contract; for, in such a case, as the principal is not known, it is impossible to say that the vendor has made his election not to trust the principal, but exclusively to trust the agent.[1] He may credit both, or either; and he is not to be presumed to have an intention to elect either exclusively, until the name and credit of both are fairly before him.[2] If no exclusive credit has been given by the vendor, in such cases, either to the principal or to the agent, it will make no difference in the rights of the vendor that there is a private and unknown agreement between the principal and agent, that either of them should be exclusively liable for the amount; for such agreements, however valid between the parties, cannot be admitted to change the rights of third persons who are strangers to them.[3] Neither, for the same reason, will a set-off which the principal has against the agent, be, under such circumstances, available against the vendor.[4]

Ellis, 490; Seymour *v.* Pychlau, 1 B. & Ald. 14, 17, 18. See Ante, § 406, note. [Where goods are sold and delivered to the husband, and his note taken for the price, and it afterwards appears that the goods were really bought by the wife and used on a farm owned by her, it was held that the husband was the agent of an undisclosed principal, and that the wife was liable, notwithstanding the husband's note was taken for the goods. Lovell *v.* Williams, 125 Mass. 439; Rayner *v.* Grote, 15 M. & W. 359. — Ed.]

[1] Ante, §§ 266–270; Thomson *v.* Davenport, 9 B. & Cressw. 78; Higgins *v.* Senior, 8 Mees. & Wels. 440.

[2] Thomson *v.* Davenport, 9 B. & Cressw. 78, 86, 88. [And until the vendor has made his election, he can hold either the principal or the agent liable on a contract. What constitutes a binding election was held to be a question for the jury. Curtis *v.* Williamson, L. R. 10 Q. B. 57; Gardner *v.* Bean, 124 Mass. 347; and in Beymer *v.* Bonsall, 79 Pa. St. 298, it was held that the agent of an undisclosed principal could not discharge himself by putting the creditor to his election, but only by the satisfaction of the debt, nor could the principal compel the creditor to elect his action and discharge either himself or his agent; but if the vendor accepts the promissory note of the buyer's agent, knowing him to be such agent, in payment, and intending to give thereby exclusive credit to the agent, he is held to have elected to hold the agent only, and if the note is unpaid, he cannot then look to the principal for payment. Perkins *v.* Cady, 111 Mass. 318. And see Swansea Shipping Co. *v.* Duncan, L. R. 1 Q. B. D. 644. — Ed.]

[3] Rich *v.* Coe, Cowp. 636; Precious *v.* Able, 1 Esp. 350; Kymer *v.* Suwercropp, 1 Camp. 109; Waring *v.* Favenck, 1 Camp. 85; Speering *v.* De Grave, 2 Vern. 643; Ante, §§ 280–300, 431–433.

[4] Waring *v.* Favenck, 1 Camp. 85. Mr. Bell, in his excellent Commentaries on Mercantile Jurisprudence, 1 Bell, Comm. § 418 (4th ed.); Id. pp. 491, 492 (5th ed.), has summed up the whole doctrine on this subject in a very satisfac-

§ 446 *a*. The fact that the agent has contracted in his own name in writing, yet with the assent of his principal and for his benefit,

tory manner. "Third parties, who have dealt with the factor, have their claim against the estate of the principal as if they had dealt with himself. The agent's contract entered into, *factorio nomine*, the principal's name being disclosed, forms a good ground of action or claim against the principal, provided the power is proved. And in this case there will be no action against the factor, unless the principal is abroad. Such is the case of a rider to a manufacturing house. In taking an order in the name of the house, he binds the house to furnish the article. In such cases, the claim may either be, first, against the principal, as the buyer of goods, for the price; or, secondly, against the principal, as the seller of goods, for delivery of the goods, or for damages. In the former case, the claim is merely for a dividend, even where the goods are still with the agent or factor, and distinguishable. In the latter, the claim also is merely personal. But where the agent is neutral, as a general commission-agent, who unites the business of a custodier with that of a broker, acting for both parties, the property may, in such situations, be held as transferred, so as to vest a real right in the buyer. Where the contract is not in the principal's name, but generally as with a factor, the election will be with the third party to hold to the credit of the factor, or to seek his remedy against the principal. And the remedy against the principal will not be hurt, either, first, by any private agreement between the principal and the factor, that the factor alone shall be responsible; or, secondly, where the principal has paid the price to his agent, who has squandered it; unless the day of payment has been allowed to pass, and the principal has been led to believe that the agent alone was relied on; or, thirdly, by the circumstance of the factor failing, with a large balance due to the principal. Where notice is given of the principal, and the third party chooses to rely on the factor, he will be entitled so to do, but will not also have his claim against the principal. Even where the factor contracts in his own name, the principal is bound to the third party, on his name and interest being disclosed. But, in such case, the principal and factor will reciprocally have the benefit of their private stipulations, as to responsibility, and of their correlative rights, in respect to the state of the balance in account between them. A *del credere* commission affects the settlement only between the principal and factor, relative to the moneys to be recovered from third parties. So, a factor with a *del credere* is responsible that the buyer shall pay the price. But although the factor will, on the buyer's failure (himself being insolvent), have the beneficial interest in claiming on the buyer's estate, he is not so much a creditor, as, on the one hand, to deprive the buyer of the benefit of retention or compensation against the principal; nor, on the other, to give his own creditors the benefit of the claim against the buyer, while they pay only a dividend to the principal. In the former case, compensation or retention against the principal will discharge the guarantee; in the latter, the principal will have his claim against the buyer on the bankruptcy, and also against the factor on his guarantee. Claims may be made by third parties against the estate of the principal, in consequence of the acts of the agent, though unauthorized by the principal. Thus, the representations of the agent, in the strict course of the contract, will be taken to form a part of the contract with the principal; and the concealment or misrepresentation of the agent will also affect the principal. In the same way, notice to

will not exclude the principal from liability, unless exclusive credit is given to the agent. Thus, if an agent with the assent of his principal and for his benefit draws a bill of exchange in his own name on his principal, which is taken by a party in the business of the principal (as to raise money for him), although the principal may not be directly bound as drawer of the bill, but the agent only, yet the party advancing the money on the bill may have an action for money paid, &c., against the principal for the amount of the advances.[1]

§ 447. The exceptions to this liability of the principal may easily be gathered from what has been already stated. If the principal and the agent are both known, and exclusive credit is given to the latter, the principal will not be liable, although the agent should subsequently fail; for it is competent to the parties to agree to charge one, exonerating the other; and an election, when once made, becomes conclusive and irrevocable.[2]

§ 448. In the common case of purchases by a factor, for a principal resident in a foreign country, we have already seen, that the credit is, from the general usage of trade, deemed to be exclusive; and, therefore, the principal is never, or, at least, is not ordinarily, deemed liable therefor.[3] And even with respect to domestic factors, a similar conclusion may arise from the previous dealings between the parties, or the peculiar circumstances of the particular

a factor or agent will be held as notice to the principal, provided such factor has power to treat and negotiate the contract. And, finally, the principal, is liable civilly for the neglect or fraud of his agent, committed in execution of the authority given to him."

[1] Allen *v.* Coit, 6 Hill, 318; Rogers *v.* Coit, 6 Hill, 322. [An undisclosed principal can sue or be sued upon an express verbal contract, and on a written contract not under seal, made for him in his agent's name, but not upon a negotiable instrument. Chandler *v.* Coe, 54 N. H. 561. And where a lease was made between A. and B. and C., with nothing in the instrument itself to indicate in what capacity B. and C. signed, but they were in fact agents of a corporation, which accepted the lease and entered upon the premises, it was held that the corporation was bound by the lease. Carroll *v.* St. John's Society, 125 Mass. 565. — Ed.]

[2] Ante, §§ 161, 278, 279, 291, 423, 432; Abbott on Shipp. Pt. 1, ch. 3, § 8, p. 76, note (1) (Amer. ed. 1829); Id. Pt. 2, ch. 3, §§ 2, 3, pp. 100–102.

[3] Ante, §§ 268, 279, 290, 296, 297, 350, 423, 432, 434; Thomson *v.* Davenport, 9 B. & Cressw. 78, 87; Smith on Merc. Law, 66 (2d ed.); Id. pp. 122, 123 (3d ed. 1843); 3 Chitty on Com. & Manuf. 203; 1 Bell, Comm. § 418 (4th ed.); Id. p. 491 (5th ed.). As to the case of a principal resident in another state of the United States, see Taintor *v.* Prendergast, 3 Hill, 72, and Ante, § 268, note; [Mortimer *v.* McCallan, 6 M. & W. 58].

transaction. Thus, for example, if an agent purchases goods for his principal, who is known, and stands by at the time of the purchase, and the vendor gives credit to the agent, that is ordinarily deemed an election to charge him alone.[1] *A fortiori*, the presumption of an exclusive credit to the agent will arise in such a case, if the agent is a domestic factor, and the principal is a foreigner, transiently in the country.[2] The case of an exclusive credit given to shipmasters for supplies or repairs, constitutes another illustration of the same doctrine; although, in a variety of cases, the material-man may have a lien on the ship, as well as the responsibility of the shipmaster and ship-owner, for the supplies or repairs.[3]

§ 449. The liability of the principal to third persons, where the purchase is made in the name of his agent, and the principal is not known or disclosed at the time, is qualified by another consideration; and that is, that the principal will not be made personally liable, if, in the intermediate time, he has settled with his agent, without any suspicion of his own personal liability, or if he would otherwise, without any default on his own part, be prejudiced by being made personally liable. Therefore, if, in the intermediate time, the principal has paid the agent for goods purchased in the name of the latter, or if the state of the accounts between the agent and the principal would make it unjust that the principal should be held liable to the vendor, such fact of payment, or such a state of accounts, would be a good defence to a suit brought by the vendor against the principal.[4] The same result would arise,

[1] Addison *v.* Gandasequi, 4 Taunt. 574, 580; Wilson *v.* Hart, 7 Taunt. 295. See Waring *v.* Favenck, 1 Camp. 85; Kymer *v.* Suwercropp, 1 Camp. 109; Ante, §§ 400, 406, 423.

[2] Ibid. See also Seymour *v.* Pychlau, 1 B. & Ald. 14, 16–19.

[3] See Abbott on Shipp. Pt. 2, ch. 3, §§ 3–18, and notes to Amer. ed. 1829; Rich *v.* Coe, Cowp. 637; Ante, §§ 294, 434; Post, § 450.

[4] Per Bayley, J., in Thomson *v.* Davenport, 9 B. & Cressw. 88, 89; Smith on Merc. Law, 65, 66 (2d ed.); Id. pp. 122, 123 (3d ed. 1843); Ante, § 434. But see Waring *v.* Favenck, 1 Camp. 85; Kymer *v.* Suwercropp, 1 Camp. 109. [In Heald *v.* Kenworthy, 10 Exc. 745, the court decided that if the "principal was induced by the conduct of the seller to pay his own agent on the faith that the agent would settle with the seller, in such a case the seller would be precluded from recovering, as it would be unjust for him to do so. But, under ordinary circumstances, the plaintiff would be entitled to recover unless he had either deceived the defendant or induced him to alter his position." Smyth *v.* Anderson, 7 C. B. 21. In Armstrong *v.* Stokes, L. R. 7 Q. B. 599, it was held, that where the seller has given credit to the agent, he must look to him, unless

if the vendor had accepted a negotiable security from the agent, for the amount, payable at a future day, or had given him a receipt, by which he had in the mean time settled with his principal, or the latter had been induced to deal differently with the agent, from what he would otherwise have done.[1] So, if the vendor had suf-

the principal, when disclosed, has not, in the mean time, paid the agent. See Smethurst *v.* Mitchell, 1 El. & El. 622; Macfarlane *v.* Giannacopulo, 3 H & N. 859; and in the latest English case, Irvine *v.* Watson, L. R. 5 Q. B. D. 102, it was held to be settled law, that where an agent in making a purchase does not disclose the fact that he is purchasing for another, the vendor may upon discovery of the principal look to him, unless in the mean time the principal has *bona fide* paid the agent for the goods. In this case, the agent disclosed the fact that he was acting as an agent, but did not disclose the name of his principal; and it was held that the vendor, in such a case, could have recourse to the principal, although he had paid the agent for the goods, and the latter had not paid over the money to the vendor, unless the vendor had so delayed in applying to the principal that the latter was justified in concluding that he had sold on the credit of the agent. And see a recent case in Massachusetts, Emerson *v.* Patch, 123 Mass. 541. — Ed.]

[1] Ante, §§ 288, 291, 433, 434; Porter *v.* Talcott, 1 Cowen, 359; 3 Chitty on Com. & Manuf. 204; Wyatt *v.* Marquis of Hertford, 3 East, 147; Marsh *v.* Pedder, 4 Camp. 257; Smith on Merc. Law, 65, 66 (2d ed.); Id. B. 1, ch. 2, § 4, pp. 121, 122 (3d ed. 1843). Mr. Lloyd, in his edition of Paley on Agency, 246–254, has made a summary of the principal cases. Although it is somewhat long, its practical utility has induced me to cite it at large in this place. "Indeed, there are several ways in which the liability of the principal may be affected, in purchases made by his agent, of which the following summary may be useful. 1st. The purchase may be made by the broker, expressly for and in the name of his principal. In that case, if the principal be debited by the seller, he only, and not the broker, will be liable. 2d. A broker may purchase in his character of broker, for a known principal; but the seller may choose, nevertheless, to take him for his debtor rather than the principal, in whose credit he may not have the same confidence; and, after this deliberate election, the seller cannot afterwards turn round and charge the principal. 3d. The broker may buy in his own name, without disclosing his principal; in which case, the invoices will, of course, be made out to him, and he will be debited with the account. If now, before payment, the seller discover that the purchase was in fact made for another, he may, at his choice, look for payment either to the broker or the principal, — to the former upon his personal contract — to the latter on the contract of his agent; and the adoption of the purchase by the principal will be evidence of the agent's authority. But, 4th. If, after the disclosure of the principal, the seller lie by and suffer the principal to settle in account with his broker for the amount of the purchase, he cannot afterwards charge the former, so as to make him a loser, but will be deemed to have elected the broker for his debtor. And, 5th. If the principal be a foreigner, it seems, that, by the usage of trade, the credit is to be considered as having been given to the English broker, and that he only, and not the foreign buyer, will be liable. That question, however, is for the jury. 6th. There is still an intermediate case, where, upon a purchase by a broker, the seller, knowing that he is acting as broker in the transaction, but not for whom, makes out the

fered the day of payment for the goods to pass by, without demanding payment, and had thereby induced the principal to suppose that

invoice to him, and debits him with the price; can the seller afterwards, when the name of the principal is made known to him, substitute him as the debtor, and call upon him for payment? On the one part, it is said, the principal, in debiting the broker, can have exercised no election; because election implies a preference, and there can be no preference when the principal is unknown. On the other part, it is answered, that the seller might have known by simply asking the question, and that the omitting to make the inquiry is decisive evidence of a deliberate preference of the broker. The Court of King's Bench has decided, that the principal, in such case, is not discharged; but the decision has not been considered very satisfactory, and is certainly not implicitly acquiesced in. 7th. It was laid down by Parke, J., in a case which underwent much consideration, that wherever the broker has stated to his principal, and the latter has *bona fide* adopted, a contract different from that under which the purchase was actually made, the seller cannot call upon the principal for payment; because the seller sues on the contract under which the goods were really sold, and is, therefore, bound to show that the principal authorized or ratified that contract, and not a different one substituted by the broker. And, although the court hesitated to adopt this proposition in its full extent, yet they were unanimously of opinion, that, if the seller have furnished the broker with the means of so misrepresenting the contract to his principal, and the latter have actually paid the broker, according to the terms communicated to him, he will thenceforth be released from all liability to the seller. 8th. Payment by the agent will, of course, discharge the principal. And it is a general principle, that if the creditor voluntarily give an enlarged credit to the agent of the debtor, or adopt a particular mode of payment whereby the principal is placed in a worse situation than he would otherwise have been, the liability of the original debtor is discharged; and, therefore, if a creditor, voluntarily, and for his own accommodation, take a security from an agent of the debtor, who afterwards fails, having in his hands funds of his principal adequate to the payment of the demand, he cannot afterwards resort to the principal. But, if the creditor take the security, not voluntarily and for his own convenience, but because he is unable at the time to procure cash, or if he take it conditionally, and not as absolute payment, or if the principal be in no respect prejudiced by the accommodation afforded to the debtor, then, to whatever extent the indulgence may have been carried, the principal will not be released. It seems, in short, that nothing will operate as a discharge to the principal, which could not be pleaded as payment, or as accord and satisfaction between the creditor and the agent. And, therefore, a receipt, given by the creditor to an agent or broker, does not necessarily of itself operate as a discharge to the principal; nor has it that effect, unless the principal appear to have dealt differently with his agent in consequence of the receipt, as by passing it in his accounts and giving him further credit upon the faith of that voucher. But, where the receipt is the means of accrediting the agent with his principal, or altering the situation of the latter, the creditor can only resort to the agent. Accordingly, in the insurance trade, where the usage is for the broker of the assured to charge his employer with premiums as paid to the underwriter, though in fact there be no money paid, but a running account kept between the broker and underwriter, it is held, that the receipt in the policy, whereby the underwriter

credit was exclusively given to the agent, and upon the faith of that he had paid over the amount to the agent, or settled it in account with him, the principal would be discharged.[1]

§ 450. Another exception may arise from the form of the contract, where, although it is authorized by the principal, and is in the course of his business, yet it is exclusively, in its form, and character, and operation, a contract between the agent and the third person.[2] In such cases, the principal is not directly liable to such third person upon the contract, although, in some cases, he may be indirectly liable.[3] Thus, where a contract is made under seal between the agent in his own name and a third person, the principal cannot sue or be sued thereon, although it may be authorized by him; as, for example, in case of a charter-party, or a bottomry bond, sealed and executed by the master of a ship; or in a contract, made

confesses himself paid the premium, is conclusive, as between him and the principal. In case of the sale of goods to an agent, payable upon time, if the time of payment has not elapsed, the principal, whether known or unknown, cannot, by a premature payment to, or settlement with, the agent, exonerate himself from responsibility to the vendor, unless it is clear, from all the circumstances, that an exclusive credit was given to the agent. Smith on Merc. Law, 65, 66 (2d ed.); Id. B. 1, ch. 5, §§ 121, 122 (3d ed. 1843); Waring *v.* Favenck, 1 Camp. 85; Kymer *v.* Suwercropp, 1 Camp. 109. In this last case, Lord Ellenborough said: "A person selling goods is not confined to the credit of a broker, who buys them; but may resort to the principal, on whose account they are bought; and he is no more affected by the state of accounts between the two, than I should be were I to deliver goods to a man's servant, pursuant to his order, by the consideration of whether the servant was indebted to the master, or the master to the servant. If he lets the day of payment go by, he may lead the principal into the supposition, that he relies solely on the broker; and if, in that case, the price of the goods has been paid to the broker on account of this deception, the principal shall be discharged. But here, payment was demanded of the defendant on the several days it became due, and no reason was given him to believe that his broker alone was trusted. He has received a great part of the coffee, and enjoyed the benefit of it; the right of the vendors is entire, unless he has paid them, or some person authorized by them to receive payment. Kenyon & Co. had no such authority; therefore, he is still liable. The rest of the coffee was stopped, only to prevent its getting into the hands of the insolvent brokers; and, as payment was to precede the delivery, it was enough, if the plaintiffs, on being paid, were ready to have delivered it." [Cheever *v.* Smith, 15 Johns. 276; Clealand *v.* Walker, 11 Ala. 1058; Hyde *v.* Paige, 9 Barb. 150; French *v.* Price, 24 Pick. 13; Filter *v.* Commonwealth, 31 Pa. St. 406; Johnson *v.* Cleaves, 15 N. H. 332.]

[1] Kymer *v.* Suwercropp, 1 Camp. 109; Smith on Merc. Law, B. 1, ch. 5, § 4, pp. 121, 122 (3d ed. 1843). [See Smyth *v.* Anderson, 7 C. B. 21.]

[2] Ante, §§ 49, 160 *a*, 161, 278, 422, 434.

[3] Ante, §§ 151, 160, 160 *a*, 161, 278, 422; Dubois *v.* Delaware & Hudson Canal Co. 4 Wend. 285; Hall *v.* Bainbridge, 1 Mann. & Gr. 42.

by the agent under his own seal, for the purchase or sale of goods, or for a lease, or for any other thing to be done, where the covenants, although on behalf of the principal, are exclusively in the names of the agent and the third person.[1]

[1] Ante, §§ 155–158, 160, 161, 162, note, 263, 273, 275, 276, 278, 279, 294, 422; Wells *v.* Evans, 20 Wend. 251; Ante, § 49, note. Lord Tenterden, in his work on Shipping, Pt. 3, ch. 1, § 2, pp. 163–165, refers to this doctrine, in the following passage: "I have before observed, that the execution of a charter-party by the master, although said to be done on behalf of the owners, does not furnish a direct action, grounded upon the instrument itself, against them. This depends upon a technical rule of the law of England, applicable as well to this as to other cases, and not affected by the mercantile practice of executing deeds for, and in the name of absent persons, the rule of the law of England being, that the force and effect, which that law gives to a deed under seal, cannot exist, unless the deed be executed by the party himself, or by another for him, in his presence, and with his direction; or, in his absence, by an agent, authorized to do so by another deed; and, in every such case, the deed must be made and executed in the name of the principal. The agent, indeed, either of the owner or merchant, may, and sometimes does, execute a charter-party, and covenant in his own name for performance by his principal, so as to bind himself to answer for his principal's default, by force of the deed. And, in an action to recover freight or demurrage, claimed in pursuance of a charter-party by deed, it has been held, the declaration must be specially framed on the deed itself. If such a charter-party be made between the master and the merchant, in pursuance of which goods are delivered to the merchant and his partners, the freight cannot be recovered in an action upon the case, brought by the owners against the merchants. So, if the owner execute a deed to the merchant, containing the usual covenant for a right delivery of the cargo, he cannot be sued by the merchant for not delivering it, in an action upon the case, grounded on the bill of lading signed by the master. But, where a charter-party, under seal, was made by the master in that character, with merchants who did not know that he was also a part-owner in the ship, as in fact he was, it was held, that they might sue him and the other owners in an action upon the case, for a breach of such general duties as were not inconsistent with the stipulations of the charter-party, such as the not providing necessaries for the voyage, and employing a negligent and unskilful master. And, whether the instrument be under seal or not, an action at law, grounded upon it, must be brought in the name of the party to it, and not in the name of another, to whom he may have assigned his interest. And, therefore, the purchaser of a ship, previously chartered, cannot sue for the freight earned under the charter-party in his own name, although payment to him will be a good discharge to an action brought in the name of the seller, at least if the purchase be made before the ship sails on the voyage. In like manner, where goods were shipped, in pursuance of a charter-party made by the master with one Partridge, and whereby he engaged to receive a cargo of fruit from the agents or assigns of Partridge, and deliver the same to him or his assigns; and, upon a shipment, he signed a bill of lading, stating the goods to have been shipped by one Strange, by order of Rovedino & Moores, to be delivered to the order of Moores, and freight to be paid according to the tenor of the contract of affreightment; it was held, that Moores could not maintain an action against the master for negligence in the stowing

§ 451. In the next place, as to the liability of principals to third persons for the acts of their agents. This topic may be dismissed in a few words; for the whole doctrine turns upon the obvious maxim, that he, who acts by another, acts by himself: "Qui facit per alium, facit per se."[1] Hence it is, that the delivery of goods by

of the fruit. Another technical rule of the law of England, applicable also to the contract by charter-party, under seal, should be noticed in this place. If a charter-party is expressed to be made between certain parties, as between A. and B., owners of a ship, whereof C. is master, of the one part, and D. and E., of the other part, and purports to contain covenants with C., nevertheless, C. cannot bring an action in his name upon the covenants expressed to be made with him, nor give a release of them, even although he seals and delivers the instrument. But if the charter-party is not expressed to be made between parties, but runs thus: This charter-party indented witnesseth, that C., master of the ship W., with consent of A. and B., the owners thereof, lets the ship to freight to E. and F.; and the instrument contains covenants by E. and F., to and with A. and B.; in this case, A. and B. may bring an action upon the covenants, expressed to be made with them; although, unless they seal the deed, they cannot be sued upon it. This latter, therefore, is the most proper form." See also Atty *v.* Parish, 4 Bos. & Pull. 104. In Tilson *v.* Warwick Gas Light Co. 4 B. & Cressw. 962, 968, Bayley, J., said: "I am not convinced by the case of Atty *v.* Parish, that, where a contract appears upon the face of a declaration to be such, that the plaintiff may recover, whether the contract be by deed or not, it is necessary to declare upon the deed, if there be one. The strong impression of my mind is, that, upon principle, although there be a deed between the parties, yet, if there be a debt, independent of the deed, the amount of which, however, is to be ascertained by the deed, the existence of the deed will not prevent the party from recovering that debt upon the common counts. And where there was a charter-party, under which the cargo was to be sent alongside the ship, at the merchant's expense, the master rendering the customary assistance with his boats and crew, and the cargo lying about thirty yards from the edge of the wharf, the master applied to the defendant's factor for laborers, to remove it into the boats, and he refused, saying he would abide by the charter-party, and the master hired laborers for the purpose, it was held, that the ship-owner might recover such expense in an action of assumpsit, notwithstanding the charter-party." Fletcher *v.* Gillespie, 3 Bing. 635. See Banorgee *v.* Hovey, 5 Mass. 11; Kimball *v.* Tucker, 10 Mass. 192. It is not, in the present state of the authorities, easy to say, in what cases the principal may or may not sue or be sued, upon written and sealed contracts of his agent, either directly or indirectly, as the cases do not seem to be in perfect harmony with each other, or to furnish any very clear or definite rule. See Ante, §§ 49, note, 160, 161, 275–278, 294, 422. [Thus, a principal who is unnamed and undisclosed cannot be made liable for the breach of a contract under seal, for the conveyance of real estate, nor compelled to perform the same specifically, nor can he enforce the same. Briggs *v.* Partridge, 64 N. Y. 357. And see, as to charter-parties, Christoffersen *v.* Hansen, L. R. 7 Q. B. 509; Pederson *v.* Lotinga, 28 L. T. 267. — Ed.]

[1] Ante, §§ 134–139; Smith on Merc. Law, 69 (2d ed.); Id. B. 1, ch. 5, § 4, pp. 127–130 (3d ed. 1843); 1 Bell, Comm. § 418 (4th ed.); Id. p. 493 (5th ed.).

a third person to an agent, and the acceptance of goods by an agent for his principal, is, in contemplation of law, a delivery to, and ac-

[In regard to the liability of the principal to third persons for the torts of his agent, there is a distinction to be made between those torts which spring from the subject-matter of the agency, and affect those with whom the agent deals on behalf of his principal through such person's relationship to the subject-matter of the agency, and those torts which arise from the manner in which the agency is transacted, and which affect those who are in other respects strangers to it, or, if they affect those with whom the agent deals, yet affect them as they might be affected were they strangers. In the first class of cases the maxim, *Qui facit per alium, facit per se*, applies. The principal, if liable at all, is liable for his own act performed by his agent. To the second class of cases the maxim has no application. The principal, if liable, is liable not for his own act, but for the act of another. His liability rests upon grounds of expediency, and is in derogation of the rule, which, with this exception, is universal, that a person is answerable for his own acts only. In this second class of cases he is not liable, unless another relation, that of master and servant, is superimposed upon the relation of principal and agent. The cases appear to warrant the conclusion that this additional relation does not exist, unless the agent would be legally bound to obey an order of the principal to abstain from the injurious act, or from the injurious mode of performing the act. When this relation exists, the master appears to be liable, provided the servant at the time is acting within the general scope of his employment, and is not obeying the directions of a third person (Murphy *v.* Caralli, 3 H. & C. 462; Coomes *v.* Houghton, 102 Mass. 211; Kimball *v.* Cushman, 103 Mass. 194; McLaughlin *v.* Pryor, 4 Scott, N. R. 655), who has some title to give directions (Garretzen *v.* Duenckel, 50 Mo. 104), such person not being an intermediate agent of the master (Stone *v.* Cartwright, 6 Tenn. 411; Brown *v.* Lent, 20 Vt. 529), and is not wilfully acting for himself instead of for his master (Mitchell *v.* Crassweller, 13 C. B. 237; Storey *v.* Ashton, L. R. 4 Q. B. 476).

To determine whether a particular act is or is not within the course of the servant's employment, is often a question of great difficulty. In the case of Williams *v.* Jones, in the Exchequer Chamber, 3 H. & C. 602, the facts were that the defendant, who was a publican, had bought of the plaintiff, a timber merchant, some deals, for the purpose of making a sign-board for a public house. The deals were removed from the plaintiff's shed to a brickyard to be dried. The plaintiff afterwards met the defendant, when he asked the plaintiff to lend him the shed to make the sign-board in, to which the plaintiff assented. The deals were brought to the plaintiff's shed, in which there was a carpenter's bench; and the defendant employed a carpenter, named Davies, to make the sign-board, and agreed to pay him £4 4*s.* for making it. While Davies was at work in the shed, making the sign-board, a carpenter, named Thomas, came there and loaded his pipe with tobacco. Davies asked him if he had a pipe full of tobacco to spare. Thomas gave it to him, and he loaded his pipe with it. Thomas then struck a match, and Davies handed a shaving, and lighted it from the match. He then dropped the shaving, and set fire to the shavings on the ground, and three sheds of the plaintiff were burned down. It was held by a majority of the court (Erle, C. J., Keating, J., and Smith, J.), that the defendant was not liable for the damage so caused.

Two cases somewhat similar have been decided in France. In the first, a

ceptance by, the principal.[1] Hence, also, a delivery of goods to the servant of a carrier, in the course of his employment, is a delivery to the carrier himself, and binds him to responsibility to the owner.[2] A delivery of goods to a master of a ship is a delivery to the owner or employer. A delivery of goods to the consignee, who is agent of the shipper, is a delivery to the latter.[3] So, payments, made by a third person to the agent, in the course of his employment, is payment to the principal; and, whether actually paid to the principal, or not, by the agent, it is conclusive upon him.[4] So, if the money is, from any circumstances, recoverable back, as, if it is paid by mistake, or upon a consideration that has failed, the principal will be liable to repay it, although he may never have received it from his agent.[5] So, a tender to an authorized agent will be a good tender to the principal.[6] Notice, also, to an agent, in the course of his em-

tiler was held liable for the burning of a mill, caused by the negligence of one of his workmen in dropping fire from his pipe among the cotton waste in a loft, as he went through it for the purpose of making some repairs upon the roof. The court held, that "when Besançon traversed the loft where these matters were deposited, either for the purpose of going to his work or in quitting it, he was in the exercise of his profession, he was there for no other purpose;" and that therefore the master was liable. Dalloz, 1847, Pt. 4, p. 423. In the second case, a husbandman was held liable for the damage caused to his neighbor's crop, by fire communicated by burning coals which the husbandman's reaper had placed upon the ground while he was at work, for the purpose of lighting his pipe, the court holding that the act which caused the damage took place within the scope of his employment ("que le délit avait eu lieu dans les fonctions auxquelles il était employé"). Dalloz, 1857, Pt. 1, p. 75. — G.]

[1] Smith on Merc. Law, 69 (2d ed.); Id. pp. 127–130 (3d ed. 1843); Mead v. Hamond, 1 Str. 505; 3 Chitty on Com. & Manuf. 207.

[2] Ibid.; Staples v. Alder, 2 Mod. 309; Taylor v. ——, 2 Ld. Raym. 792. [Thus, where the plaintiff's agent sold a bill of goods to the defendant and packed and marked and delivered them to a railroad company and notified defendant of the fact, it was held that the company was the agent of the defendant, and the delivery to them was a good delivery to the defendant. Strong v. Dodds, 47 Vt. 348. But an agent has no power to bind his principal by a receipt for goods as delivered which in fact never were delivered. Grant v. Norway, 10 C. B. 665; Hubbersty v. Ward, 8 Ex. 330; Coleman v. Riches, 16 C. B. 104. But see, to the contrary, Armour v. Mich. Centr. R. R. Co., 65 N. Y. 111, in which it was held that where an agent of a railroad company who was authorized to issue bills of lading, issued one on a forged warehouse receipt, and no goods were in fact received by the company, the latter was bound by such bill of lading. — Ed.]

[3] Abbott on Shipp. Pt. 2, ch. 2, §§ 2, 8, pp. 90–99 (Amer. ed. 1829).

[4] Ante, § 429; [Gillard v. Wise, 5 B. & C. 134].

[5] Carey v. Webster, 1 Str. 480; Mathew v. Haydon, 2 Esp. 509; 3 Chitty on Com. & Manuf. 207; Ante, §§ 408, 413, 435.

[6] Anon. 1 Esp. 349; Goodland v. Blewith, 1 Camp. 477; 3 Chitty on Com. & Manuf. 208; Ante, §§ 103, 147.

ployment, is notice to the principal.[1] So, the representations, declarations, and admissions of the agent, in the course of his agency, are deemed a part of the *res gestæ*, and equally obligatory upon the principal, as if made by himself.[2] So, a demand, made of an agent, of goods pawned to his principal, upon a tender of the money due, will, upon the refusal of the agent, if usually intrusted to deliver up such property, amount to evidence of conversion to bind the master.[3]

§ 452. In the next place, as to the liability of the principal, to third persons, for the misfeasances, negligences, and torts of his agent. It is a general doctrine of law, that, although the principal is not ordinarily liable (for he sometimes is) in a criminal suit,[4] for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in those acts or misdeeds; yet, he is held liable to third persons in a civil suit for the frauds, deceits,[5] concealments,

[1] Ante, §§ 140, 140 *a*; 3 Chitty on Com. & Manuf. 209.

[2] Ante, §§ 134–139; 3 Chitty on Com. & Manuf. 208, 209.

[3] Jones *v.* Hart, 2 Salk. 441; s. c. 1 Ld. Raym. 738; Com. Dig. *Action on the case for Negligence*, A. 1-A. 6; 4 Bac. Abridg. *Master and Servant*, K.; Ante, § 247.

[4] Attorney-General *v.* Siddon, 1 Tyrwh. 41; Rex *v.* Goutch, Mood. & Malk. 437; 3 Chitty on Com. & Manuf. 209, 210; Smith on Merc. Law, B. 1, ch. 5, § 3, p. 130 (3d ed. 1843); [Queen *v.* Stephens, L. R. 1 Q. B. 702; Commonwealth *v.* Holmes, 119 Mass. 195; Hunter *v.* State, 1 Head (Tenn.), 160; Rex *v.* Almon, 1 Leading Crim. Cas. 241; Forrester *v.* State of Georgia, 63 Ga. 349; Commonwealth *v.* Pratt, 126 Mass. 462].

[5] [A principal is undoubtedly liable, in a civil suit, for the frauds and deceits of his agent, in the course of his employment; but the extent of that liability is not so clear. If he directly authorize the fraud or deceit, he is liable to the full extent, because it is then his own act. If he ratify it with knowledge of all the facts, he is liable in the same manner. Although he be morally innocent of the fraud or deceit, yet, if the representations of the agent amount to a warranty, he is liable upon the warranty. Again, the other party can defend upon the ground of fraud against a suit brought by the principal to enforce a contract into which such fraud or deceit has entered as a material part. The other party may also, in a proper case, rescind such contract; and, again, he may have relief against it in a court of equity. It is, however, difficult to see upon what principle a person can be liable, in an action of tort, for a deceit or a fraud of which, in point of fact, he was not cognizant. According to the weight of authority, however, he is so liable. The matter has been discussed in England, in the case of Udell *v.* Atherton, 7 H. & N. 172. In this case the court were equally divided: Pollock, C. B. and Wilde, B., holding the action maintainable; and Bramwell and Martin, BB., holding the contrary. Subsequently, such an action was held maintainable in Barwick *v.* The English Joint-stock Bank, L. R. 2 Ex. 259. And again, upon the authority of this last-named case, in Swift *v.* Winterbotham, 28 L. T. N. S. 339; L. R. 8 Q. B. 244. But the contrary was held in Addie *v.* The Western Bank of Scotland, L. R. 1 H. L. S. & D. 145. In the case of Mackay *v.* The Commer-

misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them.[1] In all such cases, the

cial Bank, 30 L. T. N. S. 180, in the Privy Council, it is held to be now settled law, that the principal is answerable in an action of deceit for the fraud of his agent, acting within the scope of his authority, *where he has received a benefit from the fraud.* If the principal would not be liable *in that form of action* unless he had received a benefit from the fraud, it is not easy to see how the reception of a benefit can make him liable. In the United States such action has been held maintainable in Locke *v.* Stearns, 1 Met. 560; and in Durst *v.* Burton, 47 N. Y. 167. The agent is, of course, liable for his own fraud or deceit. See, further, for the liability of a principal for the fraud or deceit of his agent, Bennett *v.* Judson, 21 N. Y. 238; Crans *v.* Hunter, 28 N. Y. 389; Mundorff *v.* Wickersham, 63 Penn. St. 87; Crump *v.* U. S. Mining Co. 7 Gratt. (Va.) 352; Concord Bank *v.* Gregg, 14 N. H. 331; New York & New Haven R. R. Co. *v.* Schuyler, 34 N. Y. 30; Fogg *v.* Griffin, 2 Allen, 1; Lobdell *v.* Baker, 1 Met. 193. — G.] [In a recent case in the U. S. Supreme Court, Upton, Assignee, *v.* Tribilcock, 91 U. S. 45, the court said, "Where an agent of an existing corporation procures a subscription of additional stock in it by fraudulent representations, the fraud can be relied on as a defence to a suit for the unpaid instalments when the suit is brought by the corporation, and if the stockholder has in a reasonable time repudiated the contract and offered to rescind before the insolvency or bankruptcy of the corporation, the defence is valid against the assignee of the corporation." But in Miller *v.* Wild Cat, &c. Co., 52 Ind. 1, it was held that the representations of a solicitor of subscriptions to the stock of a gravel-road company, made before the organization of the company, concerning the location of the road, &c., do not bind the company after it has been organized. And an innocent principal cannot take an advantage resulting from the fraud of his agent without rendering himself civilly liable to the injured party. Thus, where a husband as agent of his wife procured by fraud an insurance upon her life, the insurance company can recover the money paid after her decease to her administrator, although she was innocent of the fraud herself. National Life Ins. Co. *v.* Minch, 5 Thomp. & C. 545. So, where an agent effects the sale of his principal's land by false representations, though without the knowledge or authority of the latter, the principal is responsible for the fraud. Law *v.* Grant, 37 Wisc. 548. See also Reynolds *v.* Witte, 13 So. Car. 5; Tagg *v.* Tennessee Nat. Bank, 9 Heisk. 479; Foster *v.* Green, 31 L. J. N. S. 158. So, where an agent of the insurer had cheated the insured into signing the papers and paying the premium, and the policy was issued upon the false statements of the agent, it was held, that the insured might hold the principal to the contract. Eilenberger *v.* Protect. Mut. Fire Ins. Co., 89 Pa. St. 464. — ED.]

[1] Chitty on Com. & Manuf. 208–210; Smith on Merc. Law, 70, 71 (2d ed.); Id. B. 1, ch. 5, § 3, pp. 127–130 (3d ed. 1843); Ante, §§ 189, 217, 308–310; Doe *v.* Marten, 4 T. R. 66, per Lord Kenyon; Bush *v.* Steinman, 1 Bos. & Pull. 404; Att'y-Gen'l *v.* Siddon, 1 Tyrwh. 41; Ante, §§ 308, 311, 315–319; Milligan *v.* Wedge, 12 Adolph. & Ellis, 737, 742; Quarman *v.* Burnett, 6 Mees. & Wels. 499; Locke *v.* Stearns, 1 Met. 560; Penn. Steam Navig. Co. *v.* Hun-

rule applies, *respondeat superior;* and it is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the

gerford, 6 Gill & John. 291. [See Barber *v.* Britton, 26 Vt. 112; Linsley *v.* Lovely, 26 Vt. 123; Southwick *v.* Estes, 7 Cush. 385; Reeves *v.* State Bank, 8 Ohio St. 476; Dudley *v.* Sautbine, 49 Iowa, 650; Corrigan *v.* Un. Sugar Refinery, 98 Mass. 577. And see, for a full collection of the authorities, 2 Thompson on Negligence, 861. See Ante, § 308, note, for short statement of the application of this principle to some of the varieties of corporations. But, of all such principals, the railroad corporations have caused, and are still causing, the greatest number and variety of decided cases in which this principle is applied. It is, of course, out of place here to do more than briefly allude to some of the numerous decisions.

Thus, railroad corporations are liable in damages to those injured by the negligence of their employés, either at street-crossings, Sweeny *v.* Old Colony, &c. R. R. Co., 10 Allen, 368; Chicago, &c. R. Co. *v.* Gretzner, 46 Ill. 74; Pennsylvania R. Co. *v.* Krick, 47 Ind. 368; Georgia R. Co. *v.* Wynn, 42 Ga. 331: or on the railroad tracks, if properly there, Goodfellow *v.* Boston, &c. Co., 106 Mass. 46; Schultz *v.* Chicago, &c. R. R. Co., 44 Wisc. 638: or in getting off or on of the trains and station platforms, Gaynor *v.* Old Colony R. Co., 100 Mass. 208; Green *v.* Erie R. R. Co., 11 Hun, 333: or by the negligence of its agents in the management of its trains, Phila. R. R. Co. *v.* Derby, 14 How. 468; Hunter *v.* Hudson Railway Iron Co., 20 Barb. 507; Drymala *v.* Thompson, 26 Minn. 40: or for injuries resulting from a collision caused by the wilful misconduct as well as the negligence of an engineer, New Orleans, &c. R. Co. *v.* Allbritton, 38 Miss. 242. See Reedie *v.* London, &c. R. R. Co., 4 W. H. & G. 244; Weed *v.* Panama R. R. Co., 3 Smith, 369. So, where an agent of the company arrested the plaintiff without due cause, although in good faith, the company were held liable. Goff *v.* Great Northern R. Co., 3 E. & E. 672; Moore *v.* Metr. R. Co., L. R. 8 Q. B. 36; Bayley *v.* Manchester R. Co., L. R. 7 C. P. 415. But a company was held not liable in such case where a clerk who issues tickets gives in custody a person whom he suspects has attempted to rob the till after the attempt has ceased. Allen *v.* London, &c. R. Co., L. R. 6 Q. B. 65. So, where a porter gives in charge an innocent person whom he suspects of stealing. Edwards *v.* London, &c. R. Co., L. R. 5 C. P. 445; Poulton *v.* London, &c. Railroad Co., L. R. 2 Q. B. 534. And a railroad corporation is liable for assaults and batteries upon passengers made by the conductors, Ramsden *v.* Boston, &c. R. R. Co., 104 Mass. 117; Coleman *v.* N. Y. & N. H. R. R. Co., 106 Mass. 160; Moore *v.* Fitchburg R. R. Co., 4 Gray, 465; see Ballou *v.* Farnum, 9 Allen, 47: and for injuries to animals caused by the negligence of their servants and employés, Chapman *v.* N. Y. Centr. R. R. Co., 33 N. Y. 369; Trout *v.* Virginia, &c. R. Co., 23 Gratt. 619; Quimby *v.* Vermont, &c. R. Co., 23 Vt. 387; Illinois, &c. R. Co. *v.* Wren, 43 Ill. 77: and for delay in forwarding freight caused by a strike of their employés without good reason, Blackstone *v.* N. Y. & E. R. Co., 6 Smith (N. Y.), 48; Hall *v.* Pennsylvania R. R. Co., 28 Am. Law Reg. 250. In this last case, however, it was held that where goods were accepted by a carrier under a bill of lading by which he was not to be liable for loss by fire, and the goods were stopped on their transit for two days and then burned by a mob, the carrier was not liable, as the loss came within the exception of the bill of lading. — Ed.]

principal, or indirectly with him through the instrumentality of agents.[1] In every such case, the principal holds out his agent, as competent, and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency.[2]

§ 453. A few cases may serve to illustrate this doctrine. Thus, a carrier will be liable for the negligence of his agent, by which the goods committed to his custody are damaged or lost.[3] So, he will be liable for the tortious conversion of the property by his agent.[4] So, the owner of a ship will be liable for damages and losses, arising to a shipper of goods by reason of the negligence, the fraud, the unskilfulness, or the tortious acts of the master.[5] So, if the master of

[1] Ante, § 308; 1 Black. Comm. 431, 432; Abbott on Shipp. Pt. 2, ch. 2, § 11; Ellis *v.* Turner, 8 T. R. 533; Bush *v.* Steinman, 1 Bos. & Pull. 404; Laugher *v.* Pointer, 5 B. & Cressw. 547; Randleson *v.* Murray, 8 Adolph. & Ellis, 109; Milligan *v.* Wedge, 12 Adolph. & Ellis, 737; Quarman *v.* Burnett, 6 Mees. & Wels. 499; Rapson *v.* Cubitt, 9 Mees. & Wels. 710; Winterbottom *v.* Wright, 10 Mees. & Wels. 109, 111; Ante, §§ 308, 311; [Wilkins *v.* Gilmore, 2 Humphreys, 140; Leggett *v.* Simmons, 7 Sm. & Mar. 348; Penn. Steam Co. *v.* Hungerford, 6 Gill & John. 291; Johnson *v.* Barber, 5 Gilman, 425; Harris *v.* Mabry, 1 Iredell, 240; Durst *v.* Burton, 42 N. Y. 167; s. c. 2 Lansing, 137. A joint action will lie against the principal and agent, for a personal injury caused by the negligence of the latter (in the absence of the former) in the course of his employment. Phelps *v.* Wait, 30 N. Y. Ct. Ap. 78. — R.].

[2] See the opinion of Lord Holt in Lane *v.* Cotton, 12 Mod. 490; 4 Bac. Abridg. *Master and Servant*, K.; Ante, §§ 11–13, 315, 316, 319; Hern *v.* Nichols, 1 Salk. 289. Mr. Justice Blackstone, in his Commentaries, gives a different reason, and says: "We may observe, that, in all the cases here put, the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer: he may frequently be answerable for his servant's misbehavior, but never can shelter himself from punishment, by laying the blame on his agent. The reason of this is still uniform and the same: that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong." 1 Black. Comm. 432. It seems to me, that the reason here given is artificial and unsatisfactory, and assumes, as its basis, a fact, which is the reverse of the truth in many cases; for the master is liable for the wrong and negligence of his servant, just as much when it has been done contrary to his orders and against his intent, as he is when he has co-operated in or known the wrong. [Stickney *v.* Munroe, 44 Me. 204.]

[3] Story on Bailm. §§ 488–583; 1 Bell, Comm. §§ 397–400 (4th ed.); Id. pp. 463–465 (5th ed.); Coggs *v.* Bernard, 2 Ld. Raym. 909, 919, 920. [But see Butler *v.* Basing, 2 C. & P. 613.]

[4] Ante, §§ 310, 315, 316; Morse *v.* Slue, 1 Vent. 238; s. c. 1 Mod. 85.

[5] 4 Bac. Abridg. *Master and Servant*, K.; Ante, §§ 315–317; Abbott on Shipp. Pt. 2, ch. 2, §§ 6–8, pp. 94–98 (Amer. ed. 1829); Id. p. 99, note (1), and cases there cited.

a ship should negligently run down, or come into collision with another ship, the owner would be liable to the party injured for the damages occasioned thereby.[1] So, if a servant should so negligently drive his master's carriage or cart, as to overturn another carriage, or to run over an individual, and do him injury, the master would be liable for the damages.[2] So, if a servant of a smith should injure a horse in shoeing him, or an assistant of a surgeon should treat a patient with gross want of skill, the principal would be liable for the damages.[3] So, if an agent should sell a piece of cloth, and warrant

[1] Abbott on Shipp. Pt. 2, ch. 2, § 11, and note (1) (Amer. ed. 1829), and cases there cited; The Thames, 5 Rob. 345; The Dundee, 1 Hagg. Admir. 109; The Woodrop Sims, 2 Dodson, 83; The Neptune the 2d, 1 Dodson, 467; Stone *v.* Ketland, 1 Wash. Cir. 142; Ante, §§ 315–317; Shaw *v.* Reed, 9 Watts & Serg. 72.

[2] Jones *v.* Hart, 2 Salk. 441; Brucker *v.* Fromont, 6 T. R. 659; Morley *v.* Gaisford, 2 H. Bl. 442; McManus *v.* Crickett, 1 East, 107, 108; Booth *v.* Mister, 7 Carr. & Payne, 66. See Quarman *v.* Burnett, 6 Mees. & Wels. 499; Post, §§ 453 *a*, 453 *b*, 453 *c.*; [Johnson *v.* Small, 5 B. Mon. 25. Thus, where the defendant was engaged in constructing a sewer, and employed men with horses and carts, and the men were allowed an hour for dinner, but were ordered not to go home or leave their horses during that time, and one of the men went home and left his horse unattended in the street before his door, whereupon the horse ran away and injured the plaintiff's property, it was held that the man was acting within the scope of his employment, and that the defendant was liable. Whatman *v.* Pearson, L. R. 3 C. P. 422. So, where a servant leaves his master's cart in the street, where it is struck by a third person and the plaintiff is injured, Illidge *v.* Goodwin, 5 C. & P. 190: and although the horse and cart belong to the agent, yet, if it is used by him about his master's business with the latter's knowledge and consent, and by the agent's negligence it is driven against another horse, the master has been held to be liable, Patten *v.* Rea, 2 C. B. N. S. 606. So, where a cabdriver was on his way back with his cab to the stables, and drove furiously and ran over the plaintiff, the owner of the cab was held liable. Venables *v.* Smith, L. R. 2 Q. B. D. 279. But the owner of a horse and carriage is not liable for an injury caused by the negligent driving of a borrower, if they were not used at the time in the owner's business. Herlihy *v.* Smith, 116 Mass. 265. So, an owner who was being driven by a careful groom is not liable for injuries caused by an accident, where he left the whole care to his servant, and the horses ran away from being frightened by a dog. Holmes *v.* Mather, L. R. 10 Ex. 261; Sharrod *v.* London &c. R. R. Co. 4 Ex. 580. — ED.]

[3] 4 Bac. Abridg. *Master and Servant*, K.; Ante, § 310. [So, if a person directs his servant to remove the snow and ice from the roof of his house, and through the negligence of the servant or of a stranger employed by him, or of a friend who volunteers to assist him, a passenger in the street is injured by the ice, the master is liable. Althorp *v.* Wolfe, 8 Smith (N. Y.), 355; and see Booth *v.* Mister, 7 C. & P. 66. And if parties occupying a store are so far the masters of a man sent by a coal-dealer to put in coal, that they can direct his actions or control the manner of delivery, then the laborer becomes their agent, and they, and not the coal-dealer, are liable for injuries caused by

it to be good, an action of deceit would lie against the master.[1] So, if an agent should fraudulently sell false jewels, or should fraudulently deceive a third person, in the matter of his agency, the principal, even if not co-operating in the act, would be liable therefor.[2]

§ 453 *a*. But very nice questions may arise, and often do arise, as to the person who, in the sense of the rule, is to be deemed the principal or employer in particular cases. Suppose, for example, a person should hire a coach and horses of a stable-keeper for a day or

his negligence. Clapp *v*. Kemp, 122 Mass. 481. So, where the defendant's servant burned down a house leased by the defendant by lighting straw to cleanse the chimney, which smoked, the defendant was liable, though he cautioned the servant not to do it. McKenzie *v*. McLeod, 10 Bing. 385. And where the defendant occupied premises from which a lamp was suspended over the highway, which was worn out, and a man in his employ accidentally caught hold of the bracket on which the lamp hung, and the bracket fell and injured the plaintiff, the defendant was held liable on the ground that he knew the lamp was out of order and was bound to put it in order. Tarry *v*. Ashton, L. R. 1 Q. B. D. 314. So, if a man's servant wrongfully pile up his master's wood in the highway and thereby an injury is caused to a traveller, the master is responsible, although he was sick at the time and knew nothing of the fact. Harlow *v*. Humistoun, 6 Cowen, 189. And where the foreman of a stevedore, whose duty it was to superintend the carriage of some rails, on board a ship, after a carrier had unloaded them, was dissatisfied with the way in which the latter did his work, and got into the cart himself and threw out some rails so negligently that a person passing by was struck and injured, the stevedore was held to be liable on the ground that the foreman was acting within the scope of his employment. Burns *v*. Poulsom, L. R. 8 C. P. 563. So, where the defendant hired a laborer for six weeks at weekly wages, and in that time the plaintiff, not knowing of such arrangement, employed the same laborer to do a job for him which was being done, when the defendant claimed and received of the plaintiff payment for the job, on the ground that the laborer's earnings during the six weeks belonged to him, the defendant was held responsible to the plaintiff for damages arising from the negligent manner in which the work — thatching wheat — was performed. Holmes *v*. Onion, 2 J. Scott, N. S. 790. But it seems that the form of the action against the master must be case, and not trespass. Yerger *v*. Warren, 31 Pa. St. 319; Railroad Co. *v*. Wilt, 4 Whart. 143; Smith's *Master and Servant*, 297; Parsons *v*. Winchell, 5 Cush. 592; Thames Steamboat Co. *v*. Housatonic R. R. Co., 24 Conn. 40. But see Phelps *v*. Wait, 30 N. Y. 78; Andrus *v*. Howard, 36 Vt. 248. — Ed.]

[1] 4 Bac. Abridg. *Master and Servant*, K.; Attorney-General *v*. Siddon, 1 Tyrwh. 41, 46, 47; § 452.

[2] Smith on Merc. Law, 70, 71 (2d ed.); Id. B. 1, ch. 5, § 3, pp. 127–130 (3d ed. 1843); Hern *v*. Nichols, 1 Salk. 289; Grammar *v*. Nixon, 6 Str. 653; Attorney-General *v*. Siddon, 1 Tyrwh. 41, 44, 48, 49; Crockford *v*. Winter, 1 Camp. 125. See also Randleson *v*. Murray, 8 Adolph. & Ellis, 109; s. c. 3 Nev. & Perry, 239; Ante, §§ 308, 311; Milligan *v*. Wedge, 12 Adolph. & Ellis, 737; Hughes *v*. Boyer, 9 Watts, 556; Story on Bailm. § 403 *a*; Quarman *v*. Burnett, 6 Mees. & Wels. 499; Rapson *v*. Cubitt, 9 Mees. & Wels. 710; Winterbottom *v*. Wright, 10 Mees. & Wels. 109, 111; § 452.

a week or a journey, and they are driven by a coachman who is furnished and hired by the stable-keeper; and the coachman, during the time, should in driving be guilty of some negligent act, by which an injury should occur to a third person, the question would arise whether the stable-keeper or the hirer would be responsible therefor. It seems formerly to have been thought, that in such a case the hirer was to be deemed the principal or employer, and, as such, responsible for the injury.[1] But the better opinion, maintained by the more recent authorities, is to the contrary;[2] for, in such a case, the coachman is to be treated as in truth the servant of the stable-keeper, and continued in his employment, notwithstanding the temporary hiring; and he could not at the same time be properly deemed the servant both of the stable-keeper and the hirer.[3] The same rule would apply to a man who hires a carriage and horses to travel from stage to stage on a journey; the carriage and horses are employed for the benefit or pleasure of the traveller, and yet the law has never considered the traveller liable, but the owner only, for the negligence of the driver.[4] The case of the hire of a hackney coach affords a stronger illustration. There the owner of the coach, and not the hirer for his temporary convenience or profit, will be held to be responsible for the negligence of the coachman.[5] Upon the like ground, the hirer of a wherry on the Thames, to go from one place to another, would not be responsible for the conduct of the waterman; nor the owner of a ship chartered for a voyage on the ocean, for the misconduct of the crew employed by the charterer.[6]

§ 453 *b*. But a case of a more nice character may easily be put, and, indeed, has undergone a judicial decision. Suppose a person to be the owner of a coach, and he hires from a job-master horses and a driver for the coach to draw them for a day or a drive, and,

[1] See the opinion of Mr. Justice Heath, in Bush *v.* Steinman, 1 Bos. & Pull. 404, 409, and that of Holroyd, J., and Bayley, J., in Laugher *v.* Pointer, 5 B. & Cressw. 564, 568.

[2] Quarman *v.* Burnett, 6 Mees. & Wels. 499, 509, 510; Hughes *v.* Boyer, 9 Watts, 556; [Weyrant *v.* H. Y. & H. Railroad, 3 Duer. 360; Powles *v.* Hider, 6 El. & Bl. 208].

[3] Per Littledale, J., in Laugher *v.* Pointer, 5 B. & Cressw. 547. See Chilcot *v.* Bromley, 12 Ves. 114.

[4] Ibid.; Sammell *v.* Wright, 5 Esp. 263; Dean *v.* Branthwaite, 5 Esp. 35.

[5] Ibid.; Per Littledale, J., and Lord Tenterden, in Laugher *v.* Pointer, 5 B. & Cressw. 562, 563, 578, 579; McLaughlin *v.* Prior, 4 Mann. & Gr. 48. [See Bard *v.* John, 26 Penn. St. 482.]

[6] Per Lord Tenterden, in Laugher *v.* Pointer, 5 B. & Cressw. 578, 579.

through the negligence of the driver, an injury is done to a third person; the question would arise, who is responsible for the wrong, whether the owner of the coach or the owner of the horses, who also hires the driver. It has been recently adjudged, after no inconsiderable conflict of opinion in prior cases, that the owner of a coach is not, and that the owner of the horses is, under such circumstances, the responsible principal.[1] The true distinctions and doctrines which govern or ought to govern the cases, were upon that occasion fully expounded by the learned judge,[2] who delivered the opinion of the court. "Upon the principle," said he, "that 'Qui facit per alium, facit per se,' the master is responsible for the acts of his servant; and that person is undoubtedly liable, who stood in the relation of master to the wrong-doer; he, who had selected him as his servant, from the knowledge of, or belief in, his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly or intermediately through the intervention of an agent, authorized by him to appoint servants for him, can make no difference. But the liability by virtue of the principle of relation of master and servant, must cease, where the relation itself ceases to exist; and no other person than the master

[1] Quarman *v.* Burnett, 6 Mees. & Wels. 499, 509, 510; Story on Bailm. § 403 *a*, note; Post, § 454. In the case of Laugher *v.* Pointer, 5 B. & Cressw. 547, where the owner of a carriage hired of a stable-keeper a pair of horses to drive it for a day, and the stable-keeper provided a driver, through whose negligent driving an injury was done to the horse of a third person, the Court of King's Bench were equally divided upon the question, whether the owner of the carriage was liable for the injury or not; Lord Tenterden and Mr. J. Littledale held him not liable, and Mr. J. Bayley and Mr. J. Holroyd held him liable. The opinions of the learned judges, on that occasion, exhausted the whole learning on the subject, and on that account should be attentively studied. The decision in Quarman *v.* Burnett affirmed the doctrine of Lord Tenterden and Mr. J. Littledale, and that decision has been uniformly adhered to in all the later cases. See Randleson *v.* Murray, 8 Adolph. & Ellis, 109; Milligan *v.* Wedge, 12 Adolph. & Ellis, 737; Rapson *v.* Cubitt, 9 Mees. & Wels. 710; Martin *v.* Temperly, 4 Q. B. 298. [So, in a recent case, where the owner of a ferry hired of T. for one day a steam-tug and crew to assist in ferrying passengers across, and T. sent and paid the crew, and was paid by the owner of the ferry for the services of the tug and crew, and a passenger was injured while crossing by a breaking of the tackle of the tug through the negligence of the crew, T. was held liable, whether the passenger did or did not also have a remedy against the owner of the ferry. Dalyell *v.* Tyrer, 1 El., Bl. & El. 899. See Reedie *v.* London & North-western Railway Co., 4 Wels., Hurlst. & Gor. 244. — R.]

[2] Mr. Baron Parke.

of such servant can be liable, on the simple ground, that the servant is the servant of another, and his act the act of another. Consequently a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; and to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position, as Lord Chief Justice Eyre says, in the case of Bush *v.* Steinman, and cannot be maintained to its full extent, without overturning some decisions, and producing consequences which would, as Lord Tenterden observes, 'shock the common-sense of all men;' not merely would the hirer of a post-chaise, hackney-coach, or wherry on the Thames, be liable for the acts of the owners of those vehicles, if they had the management of them or their servants, if they were managed by servants; but the purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness, whilst passing along the street."[1]

§ 453 *c.* Another case of a novel character, calling for the exposition of the general principles applicable to this subject, recently occurred in America. A brig, which was towed at the stern of a steamboat, employed in the business of towing vessels in the river Mississippi, below New Orleans, was, through the negligence of the master and crew of the steamboat, over whom those in charge of the brig had no control, brought into collision with a schooner lying at anchor in the river. A suit was brought by the owners of the schooner against the owner of the brig for the damages sustained by the collision; and the question was, whether the owners of the brig were liable therefor. It was held, upon full argument, that they were not, upon the ground, that the master and crew of the steamboat were not the servants of the owner of the brig; were not appointed by him; did not receive their wages or salaries from him; had no power to order or control them in their movements; and had no contract with the master and crew of the steamboat, but only through the master with the owners of the steamboat for a

[1] See also Milligan *v.* Wedge, 12 Adolph. & Ellis, 737; Winterbottom *v.* Wright, 10 Mees. & Wels. 109, 111; Post, § 454 *a.*

participation in the power of the steamboat, derived from the public use and employment thereof by the owners.[1]

[1] Sproul *v.* Hemingway, 14 Pick. 1. Mr. Chief Justice Shaw, in delivering the opinion of the court in this case, said: "The owners of a vessel or coach are held liable for damages to third persons, occasioned by the negligence or unskilfulness of those who are in the management of the ship or coach. 1. Either because they are engaged or employed by them, are subject to their order, control, and direction, and so are to be deemed, either generally or for the particular occasion, their servants. 2. Or, in respect to their being engaged in the business or employment of the owners, conducting and carrying on such business for the profit or pleasure of the owners, by reason of which the acts done in the prosecution of such business, shall be taken *civiliter* to be done by the employers themselves, and this, whether the persons whose negligence is the cause of damage have been retained and employed by the principal himself, or by the procuration of others, employed by him for the purpose. Tried by either of these principles, we think, that the defendant is not responsible for damages attributable to the carelessness or want of skill of the master and crew of the towing vessel. They were not the servants of the defendant; were not appointed by him; did not receive their wages or salaries from him; the defendant had no power to remove them; had no power to order or control them in their movements; had no contract with them, but only through them, with the owners of the steamboat, for a participation in the power, derived from the public use and employment of that vessel by her owners. After making such contract, it was perfectly in the power of the owners of the steamboat to appoint another master, pilot, and crew, and the defendant would have had no cause of complaint. 3. Nor can the master and crew of the steamboat, in any intelligible sense, be considered as in the employment or business of the defendant, any more than a general freighting ship, her officers and crew, can be considered as in the employment of each freighter of goods, or the master and crew of a ferry-boat in the employment of the owners of each coach, wagon, or team, transported thereon. The steamboat was engaged in an open, public, distinct branch of navigation, that of towing and transporting vessels up and down the Mississippi, for a certain toll or hire, for the profit of the owners. The defendant seemed to have the same relation to the steamboat that a freighter has to a general ship, or a passenger to a packet. The defendant participated in the benefit but incidentally and collaterally; he did not share in the profits of the business, one, which, from its magnitude, may well be called the trade of towing. Such a trade may be considered as much a public and distinct employment, as that of freighting or conveying passengers. The steamboat was in no sense in the possession of those whom she was employed to tow. If it is contended, that the defendant is liable on the ground, that the steamboat was, for the time being, in his possession, occupation, or employment, then it would follow, that the defendant would be liable for the negligence of the officers and crew of the steamboat, as well whether the plaintiff's vessel was struck by the defendant's vessel, 'The Burton,' as struck by either of the other vessels towed, or by the steamboat herself; which cannot for a moment be contended. The case may well be illustrated by considering the condition of one of the side vessels, firmly lashed to the steamboat, and governed wholly by its movements. The payment for the privilege of being thus moved or transported, is

§ 453 *d.* It will be observed, that the rule is generally laid down, that the principal is liable to third persons for the misfeasances, negligences, and omissions of duty, of his servants and agents. And the question, therefore, remains to be considered, whether the same rule applies to cases of different agents, employed by the same principal, where one by his misfeasance, or negligence, or omission of duty, does an injury to the other, as is applied to strangers to that relation. This, like many other questions of an important nature, arising from the complicated business of modern society, has not, until recently, become a subject of judicial examination. Two classes of cases may be suggested: (1st.) Where the different agents are employed in the same business or employment by the principal;[1]

precisely like freight paid for heavy luggage, timber, or spars, for instance, carried in or upon a ship. The whole conduct or management is entirely under the control of the master and crew of the towing vessel in the one case, as it is of the freighting ship in the other. If collision takes place between the side ship, thus firmly lashed, and another vessel, it is as directly attributable to the steamboat, and her officers and crew, as if the steamboat herself had come into collision with the other vessel. The towed ship is the passive instrument and means, by which the damage is done. But there is no difference, in this respect, between the condition of one of the side ships, and a ship towed astern, except this: that, on board the ship towed astern by means of a cable, something may and ought to be done by the master and crew, in steering, keeping watch, observing and obeying orders and signs; and, if there be any want of care and skill in the performance of these duties, and damage ensue, then the case we have been considering does not exist; the damage is attributable to the master and crew of the towed ship, and they and their owners must sustain it. The jury were so instructed at the trial, and it was left for them to find whether the damage was caused by the negligence of the one or the other. Then, supposing all duties faithfully performed on board the towed vessel, and the damage to be caused by the negligence or misconduct of the master and crew of the steamboat, there is no difference between the case of the side ship, which is wholly passive, and the ship astern, which is partially so. The case most nearly resembling this, perhaps, is that of a vessel chartered, where, for a certain time, the whole use and benefit of the ship is transferred to the charterers, but the officers are appointed, and the crew engaged and subsisted by the owners; in which case it is held, that the owners, and not the charterers, are responsible to third persons for any damage occasioned by the negligence of the officers and crew. Fletcher *v.* Braddick, 5 Bos. & Pull. 182. Under the circumstances of this case, the court are of opinion, that the defendant is not responsible for damage arising from the negligence or unskilfulness of the master, officers, and crew of the steamboat; that the direction, in this respect, at the trial, was correct, and that there must be judgment on the verdict."

[1] [1. But for damage caused by the ordinary risks of the employment, the master is not liable. Priestley *v.* Fowler, 3 M. & W. 1. Here there is no peculiar principle of law applicable to the relation of master and servant. In

(2d.) Where different agents are employed in different businesses or employments by the same principal. In respect to the former,

such case no fault is imputable to the master. These are the risks to which every one, master and servant alike, is at all times exposed throughout his life; personal prudence is the uncertain but only guard which any one has against them. The reason usually given for the non-liability of the master for these risks, is that the hazard of the employment is compensated by the rate of wages. This reason is false in point of fact. Even in the case of skilled labor, only extra-hazardous employments are compensated by wages enhanced on that account, and there but to a limited extent; while unskilled labor, which is by far the largest part of all labor, must take that employment which circumstances offer. But, however this may be, the rule needs no special reasons for its support; because it is but an application of the general principle, that where there is no fault there is no liability.

2. Where the personal negligence of the master has directly caused the injury, there also the master's liability to the servant is the same as it would be to one not a servant. Roberts *v.* Smith, 2 H. & N. 213; Ashworth *v.* Stanwix, 3 E. & E. 701; Mellors *v.* Shaw, 1 B. & S. 437; Paulmier *v.* Erie R.R. Co. 34 N. J. 151; Ardesco Oil Co. *v.* Gilson, 63 Penn. St. 146.

3. It is the duty of all who occupy real property to which others have the right to resort upon business with the occupier, to take care that those so resorting there are not exposed to hidden dangers. Such persons have a right to expect that the occupier will use reasonable care to guard them from dangers of the existence of which he is, or ought to be, aware, and of the existence of which they are ignorant, provided he has no good reason to presume that they have equal knowledge upon the subject with himself. Indermaur *v.* Dames, L. R. 1 C. P. 274; L. R. 2 C. P. 311; Lancaster Coal Co. *v.* Parnaby, 11 Ad. & Ell. 223; Chapman *v.* Rothwell, E., B. & E. 168. The same duty which is imposed upon an occupier of real estate towards those resorting there upon lawful business, is also imposed upon one who, in the way of business, intrusts his machinery, tools, and implements, or his personal property of any kind, to others to be used, toward those thus using them. Story on Bailm. § 275; Blakemore *v.* Bristol, &c., Railw. Co. 8 E. & B. 1035, 1051; McCarthy *v.* Young, 6 H. & N. 329; Story on Bailm. 390, 391 *a*; Redfield on Carriers, § 513, note; Sawyer *v.* Rutland & Burlington R. R. Co. 27 Vt. 377; Smith *v.* New York & Harlem Railway Co. 19 N. Y. 127; Caswell *v.* Worth, 5 E. & B. 849. Notwithstanding the *dictum* of Willes, J., in Indermaur *v.* Dames, concerning "the authorities . . . respecting servants and others who consent to incur a risk being inapplicable" to that case, it is submitted that such authorities are precisely in point, and that the decided cases fully bear out the assertion that the position of the master toward his servant in respect to his real estate, his machinery, or his tools, is precisely the same as his position in those respects to all other persons with whom he has business relations touching their use. In other words, upon this point, also, there is no peculiar law applicable to the relation of master and servant. Cases may be unlike in some of their circumstances, but the rule of law applicable to them may be the same. A servant may be as well acquainted as, or better acquainted than, his master with the danger of premises or the defects of machinery. If he is, he cannot recover. But the same is true of any other person having business with the master. The presumption of knowledge on the part of the servant, the presumption of ignorance

the doctrine at present maintained is, that the principal is not liable for any such injury, done to one agent by another agent, while en-

on the part of others, are presumptions of fact, and not of law. There is no principle of law better established or more constantly reiterated than that it is the master's duty to take all reasonable precautions for the safety of his servant, and that when he knows, or should know, that his premises, his machinery, or his implements are unsafe, and when the servant is ignorant of the fact, the master having no sufficient cause to presume his knowledge, if damage from such cause happen to the servant, the master is liable. Paterson *v.* Wallace, 1 Macq. H. L. Cas. 748; Williams *v.* Clouch, 3 H. & N. 258; Mellors *v.* Shaw, 1 B. & S. 437; Ashworth *v.* Stanwix, 30 L. J. Q. B. 183; Roberts *v.* Smith, 2 H. & N. 213; Skipp *v.* Eastern Counties Railway, 9 Exch. 223; Bartonshill Coal Co. *v.* Reid, 3 Macq. H. L. Cas. 266; Bartonshill Coal Co. *v.* McGuire, Ib. 300; Holmes *v.* Clarke, 6 H. & N. 349; Coombs *v.* New Bedford Cordage Co. 102 Mass. 572, 586; O'Byrne *v.* Barne, 16 Cases Court Sess. (2d ser.) 1025; Grizzle *v.* Frost, 3 F. & F. 622; Ogden *v.* Rummens, 3 F. & F. 751; Snow *v.* Housatonic R.R. Co. 8 Allen, 441. It is submitted that no case upon the subject can be found which, apart from the *dicta* it may contain, is not an authority for the position that the duty which the master owes to the servant is precisely that which he owes to every other person with whom he has business relations.

4. The liability of the master to a third person, a stranger to the agency, for the negligence of his servant, is an exception to the rule that one is liable only for his own torts. Shall the *exception be extended* to embrace cases where the person injured, instead of being a stranger to the agency, is himself a part of it; or, as it is usually expressed, to the case of a servant injured by a fellow-servant? Now, whatever reasons can be given for making an exception to the general rule, by holding the master liable for the negligence of his servant towards a third person (and various reasons of greater or less weight can be given), many of them are more or less weakened, or fail entirely, when applied to the case of servants who are jointly engaged in the same undertaking. But the reason which appears to have had the most influence in preventing the extension of the exception to the case of so-called fellow-servants, is that the servant, who is himself engaged in the employment, working in unison with other servants, and knowing what is taking place, is generally in a better position to guard himself against things passing around him, and in his sight, than his master, who may be at a distance, can be to protect him. It is now the generally received law, that a master is not liable to one servant for the negligence of another servant; provided that at the time of the original employment the servant was a fit servant, and provided that, if the servant has become subsequently unfit, the master did not know, and might not have known, of his subsequent unfitness. Hutchinson *v.* Newcastle, &c. Railw. Co. 5 Exch. 343; Morgan *v.* Vale of Neath Railw. Co. 5 B. & S. 570; L. R. 1 Q. B. 149; Feltham *v.* England, L. R. 2 Q. B. 33; Gilman *v.* Eastern R. R. Co. 10 Allen (Mass.), 233; Beaulieu *v.* Portland Co. 48 Me. 291; Weger *v.* Pennsylvania R. R. Co. 55 Penn. St. 460. The rule as to the hiring or continued employing of unfit servants is the same as the furnishing or employment of unfit machines. Harper *v.* Indianapolis, &c. R. R. Co. 47 Mo. 567; Davis *v.* Detroit, &c. R. R. Co. 20 Mich. 105. A man, in relation to labor, is a machine.

The resources which a servant has to protect himself against the negligence

gaged in the same business or employment. The reason assigned is, that the mere relation of master and servant or principal and

of another in the same employment may vary indefinitely, according to the circumstances of each particular case. When the servants are engaged in the same capacity, upon the same piece of work, they are great. As between an inferior and a superior, whose directions the inferior is bound to obey, they may be and often are small. It may well be, therefore, that distinctions might be made; and that in some cases, a master might be held liable for the negligence of one servant toward another servant, and that in other cases he might not be so held. Such distinctions, however, when attempted, have been commonly met by the objection, that to make them "would be letting in a flood of litigation" — an expression stronger in sound than in sense, and as a reason of very doubtful legitimacy. The cases in which such distinctions have been proposed, are cases which turn upon the question, Who are fellow-servants? For, in the decisions, the term fellow-servants is made to signify those servants for negligence between whom no action is allowed against the master. The term is ill fitted to express such a meaning; because it suggests a meaning which is not, and conceals the meaning which is, intended to be conveyed.

The rule now apparently established in England, and generally, perhaps, in this country, is, that the term fellow-servant includes all who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it. Wonder *v.* Baltimore, &c. R. R. Co. 32 Md. 411; Wilson *v.* Merry, L. R. 1 H. L. S. & D. 326; Columbus & Indianapolis, &c. R. R. Co. *v.* Arnold, 31 Ind. 174; Warner *v.* Erie Railw. Co. 39 N. Y. 470; Hard *v.* Vermont & Canada R. R. Co. 32 Vt. 480; Beaulieu *v.* Portland Co. 48 Me. 291; Wiggett *v.* Fox, 11 Exch. 832; Searle *v.* Lindsey, 11 C. B. N. S. 429; Morgan *v.* Vale of Neath R. R. Co. L. R. 1 Q. B. 149; Weger *v.* Pennsylvania R. R. Co. 55 Penn. St. 460; Harper *v.* Indianapolis, &c. R. R. Co. 47 Mo. 567. But this rule must be considered as subject to future modifications and exceptions.

In the case of Ford *v.* Fitchburg R. R. Co. 110 Mass. 240, the plaintiff was an engineer, engaged in running a locomotive engine, and was injured by explosion of his engine, which was old and out of repair. It was objected to the maintenance of the action, that the want of repair of the engine was caused by the negligence of his fellow-servants; but Colt, J., in delivering the opinion of the court, said: "The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risk of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery, are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to the servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing

agent, creates no contract, and therefore no duty, on the part of the principal, that the servant or agent shall suffer no injury from the

them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one, the master cannot escape the consequence of the agent's negligence; if the servant is injured in the other, he may." See also Fort *v.* Union Pacific R. R. Co. 2 Dillon, 259.

In Iowa, by statute, railroad companies are made liable for all damages sustained by any person, including employés of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineers or other employés of the corporation. Hunt *v.* North-western R. R. Co. 26 Iowa, 363.

It is held in Ohio that, where one servant is placed in a position of subordination to, and subject to the orders and control of, another servant of a common master, and the subordinate servant, without fault of his own, and while in the performance of his duty, is injured through the negligence of the superior servant while acting in the common service, an action lies, in favor of the inferior servant so injured, against the master. Pittsburg, Fort Wayne, &c. R. R. Co. *v.* Devinney, 17 Ohio St. 197, 210.

But new questions will undoubtedly arise upon this subject. Abraham *v.* Reynolds, 5 H. & N. 143. In attempting their solution, it would be well to settle more definitely, than has yet been done, the grounds upon which a master is, in any case, made liable for the negligence of his servant toward a stranger to the agency; and to see what, and how many, of such reasons apply, and with what force, to such new cases. This seems never as yet to have been attempted.

The case of Albro *v.* Jaquith, 4 Gray (Mass.), 99, purports to decide that one fellow-servant is not liable to another fellow-servant for damages occasioned to the latter by the negligence of the former. It is difficult to understand the reasoning of the court in this case; and, whatever it may be, it does not appear to support the decision. There is a *dictum*, however, to the same effect by Pollock, C. B., in Southcote *v.* Stanley, 1 H. & N. 247–250. It would seem that it should require grave considerations of public expediency to justify the anomaly of holding a person exempt from liability for his personal fault. It does not follow that because a master is not liable for the fault of another, that, therefore, that other should not be liable for his own fault.

If the servant by his own negligence has directly contributed to the happening of the event for which he brings his action, he cannot recover. Here, also, there is no rule of law peculiar to the relation of master and servant. It is a rule common to all actions for the reparation of damage caused by negligence, by or against whomsoever they may be brought. In such actions it is incumbent upon the plaintiff to establish that the negligence of the defendant was one of the causes without the direct operation of which the event would not have happened. It is not incumbent upon him to show affirmatively that his own negligence did not contribute to the result. Pennsylvania Land Co. *v.* Bentley, 66 Penn. St. 30; Cleveland R. R. Co. *v.* Rowan, Ib. 393; Railroad Co. *v.* Gladman, 15 Wall. 401. It is a principle running throughout the entire body of the English law, that every person is presumed to have conducted himself, in all respects, properly, till the contrary is shown. But in the class of cases we are considering, the natural instinct of self-preservation which leads every one to guard himself from harm, would often suffice to establish the pre-

negligence of others, employed by him in the same business or service; and that, in such cases, the servant or agent takes upon himself the hazards of any such injury, which may arise in the course of such business or employment; and his remedy for any such injury, by the misconduct or negligence of a fellow-servant or agent, lies solely against the wrong-doer himself. Any other doctrine (it is said) would lead to mischievous consequences, and create responsibilities on the part of principals, the nature and extent of which could scarcely be measured; and the public policy, upon which the rule itself is founded, would be subverted, instead of being subserved, by giving it such a comprehensive grasp. Thus, for example, where two servants of the same master were employed in conveying goods in a van of the master, in his business, and by negligence, in

sumption that the plaintiff did what he could to escape danger, were there no such principle.

But in Massachusetts, the rule is firmly established that the burden is always upon the plaintiff to establish that the injury was not attributable to any want of due care upon his part. Murphy *v.* Deane, 101 Mass. 455. This rule, which has been sanctioned by a long course of judicial decision, appears to have originated in a misunderstanding of the true point decided in the case of Butterfield *v.* Forrester, 11 East, 60. The negligence of the defendant having been established, the negligence of the plaintiff, which will bar his recovery, must be negligence which directly contributed to the injury. If the damage would have happened whether the plaintiff had been negligent or careful, then the plaintiff's negligence, if he were negligent, cannot, as a general rule, in reality have contributed to it. Again, if the plaintiff, in the first place, by his negligence has exposed himself to the danger of being injured by the subsequent negligence of other persons, such conduct on his part does not give them the right to injure him either intentionally or by negligent conduct. The matter is stated in Tuff *v.* Warman, 5 C. B. N. S. 573, as follows: "The proper question for the jury is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened: in the first place, the plaintiff would be entitled to recover; in the latter not, as, but for his own fault, the misfortune could not have happened. Mere negligence, or want of ordinary care or caution, will not, however, disentitle the plaintiff to recover, unless it be such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff." And this declaration of the rule has, since the decision of that case, been very generally received in this country as the true one. Hoffman *v.* Union Ferry Co. 47 N. Y. 176; New Jersey Express Co. *v.* Nichols, 33 N. J. 435. The law as laid down in Tuff *v.* Warman has been disapproved of by the Supreme Court of Massachusetts, in the case of Murphy *v.* Deane, 101 Mass. 455. — G.]

the overloading of the van by one, it broke down upon the road, and thereby the other received a severe injury, for which he brought an action against his master, founded upon such negligence; it was held, that the action was not maintainable.[1]

[1] Priestley *v.* Fowler, 3 Mees. & Wels. 1. In this case, Lord Abinger, in delivering the opinion of the court, said: "If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible, by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage, owing to the negligence of the coach-maker, or for a defect in the harness, arising from the negligence of the harness-maker, or for drunkenness, neglect, or for want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down, while asleep, and injure himself; for the negligence of the cook in not properly cleaniug the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins. The inconvenience, not to say the absurdity, of these consequences, affords a sufficient argument against the application of this principle to the present case. But, in truth, the mere relation of the master and the servant never can imply an obligation, on the part of the master, to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant, in the course of his employment, to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service, in which he reasonably apprehends injury to himself; and in most of the cases, in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it, as the master. In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known, as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution, which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others, who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford." [And although the servant guilty of negligence is the superior of the servant injured, and the latter is subject to the control of the former, so that he could not guard against his negligence, their common employer is not liable.

§ 453 *e*. A case of quite as novel a character, has recently occurred and is illustrative of the same doctrine. Two persons were employed by a railroad company in their business, the one as an engineer to manage the engines and cars on the road, the other to tend the management and shifting of certain switches on the rail-

Seymour *v*. Maddox, 16 Ad. & E. N. S. 326; Ormand *v*. Holland, 1 El. Bl. & El. 102. As, where the negligent fellow-servant is the vice-principal of a colliery, Howells *v*. Landore Steel Co., L. R. 10 Q. B. 62: or the manager of a mine, Mellors *v*. Unwin, 1 Best & Sm. 437: or the builder of a scaffolding, Gallagher *v*. Piper, 16 C. B. N. S. 669; Lovegrove *v*. London, &c. R. Co., 16 C. B. N. S. 668: or the foreman of the work, O'Connor *v*. Roberts, 120 Mass. 227; Zeigler *v*. Day, 123 Mass. 152; Malone *v*. Hathaway, 64 N. Y. 5. And where the defendants were sinking a shaft and engaged W. to complete it, and the latter employed and paid workmen, and defendants supplied the steam power, and the plaintiff, who was employed and paid by W., was injured by the negligence of an engineer who was under the control of W. but paid by defendants, it was held he could not recover. Rourke *v*. White Moss Colliery Co., L. R. 1 C. P. D. 556; 2 C. P. D. 205. And where the defendant's gates were safe when open, but liable to fall when closed, and the plaintiff, a servant of the defendant, was injured by the fall of the gate, and there was no evidence that persons employed by the defendant were incompetent, or of the cause of the accident, it was held that if there was any proof of negligence it was that of a fellow-servant, and the defendant was not liable. Allen *v*. New Gas Co., L. R. 1 Ex. D. 251. So, where the defendant employed the plaintiff, a bricklayer, and the defendant's foreman erected a scaffolding with unsound timber, in consequence of which it fell while the plaintiff was at work upon it, it was held that the defendant was not liable, it not being contended that the defendant's foreman was deficient in skill, or an improper person to be employed for that purpose. Wigmore *v*. Jay, 5 Exch. 354; Tarrant *v*. Webb, 18 C. B. 797; Fox *v*. Sandford, 4 Sneed, 36. So, where the plaintiff was an operative in the defendant's mill, and the defendant's superintendent had the charge of lighting the mill and managing the gas for that purpose, and on one occasion so negligently managed the gasometer that large quantities of gas escaped into the mill and greatly injured the plaintiff at her work, the court held the defendant company not liable. Albro *v*. Agawam Canal Co. 6 Cush. 75; Feltham *v*. England, L. R. 2 Q. B. 33. The decision of the court in the recent case of Johnson *v*. City of Boston, 118 Mass. 114, has excited some discussion. In that case the facts were as follows: The plaintiff was in the employ of a man who hired a great many men in the business of drilling and blasting rock, and sent his workmen from place to place to do the work. When the plaintiff was injured he was working in a city sewer, which fell in from the negligence of the servants of the city, and he was working under the superintendence of a fellow-workman, who received the same pay as he did. He was ordered to drill in places pointed out by the foreman of the sewer department of the city in charge of the whole work, but the city paid the plaintiff's employer a certain sum per day for each of his men, and the employer paid them a less sum, and they were under his direct control all the time, and he could discharge them. The court held, relying on the decisions of Kimball *v*. Cushman, 103 Mass. 194, and Hilliard *v*. Richardson, 3 Gray, 349, and Wiggett *v*. Fox, 11 Exch. 832, that the plaintiff was a fellow-servant with the

way. The latter, although he was properly selected by the company, as a person of due skill and reasonable diligence, negligently put or left a switch across the railway, whereby the engine and cars were thrown off the track, and the engineer was severely injured. He brought an action therefor against the company; and it was held, upon full argument, that the action was not maintainable; but that the action should have been against the wrong-doer himself. The ground upon which the court proceeded, was, that neither principle, nor authority, nor public policy, justified such an extension of the rule; and that the perils incident to such a service, were as likely to be known to the agent as to the principal; and might be distinctly foreseen and provided against by him in his rate of compensation, if he chose; and he must be presumed, in the absence of any different contract, to take them upon himself.[1] In neither of

servants of the city whose negligence caused the accident. See Murray *v.* Currie, L. R. 6 C. P. 24. — Ed.]

[1] Farwell *v.* The Boston & Worcester Railroad Corporation, 4 Met. 49. Mr. Chief Justice Shaw, in delivering the opinion of the court, went into an elaborate examination of the whole subject, and said: "This is an action of new impression in our courts, and involves a principle of great importance. It presents a case, where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose, — that of the safe and rapid transmission of the trains; and they are paid for their respective services, according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is, whether, for damages, sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. It is an argument against such an action, though certainly not a decisive one, that no such action has before been maintained. It is laid down by Blackstone, that, if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise, the servant shall answer for his own misbehavior. 1 Bl. Comm. 431; M'Manus *v.* Crickett, 1 East, 106. This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself, or by his agents or servants, shall so conduct them as not to injure another; and, if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter*. But this presupposes, that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim, *Respondeat superior*, is adopted in

these cases, could there be the least doubt, that the principal would have been liable, if the injury had been occasioned by his own personal negligence or omission of duty.

that case, from general considerations of policy and security. But this does not apply to the case of a servant bringing his action against his own employer, to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear, may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated. The same view seems to have been taken by the learned counsel for the plaintiff in the argument; and it was conceded, that the claim could not be placed on the principle indicated by the maxim, *Respondeat superior*, which binds the master to indemnify a stranger for the damage caused by the careless, negligent, or unskilful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties, applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant. It would be an implied promise, arising from the duty of the master, to be responsible to each person employed by him, in the conduct of every branch of business, where two or more persons are employed, to pay for all damage occasioned by the negligence of every other person employed in the same service. If such a duty were established by law, — like that of a common carrier, to stand to all losses of goods not caused by the act of God or of a public enemy, — or that of an innkeeper, to be responsible, in like manner, for the baggage of his guest; it would be a rule of frequent and familiar occurrence, and its existence and application, with all its qualifications and restrictions, would be settled by judicial precedents. But we are of opinion, that no such rule has been established, and the authorities, as far as they go, are opposed to the principle. Priestley *v.* Fowler, 3 Mees. & Wels. 1; Murray *v.* South Carolina R. R. Co. 1 McMullan, 385. The general rule, resulting from considerations as well of justice as of policy, is, that he, who engages in the employment of another, for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services; and, in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle, which should except the perils arising from the carelessness and negligence of those who are in the same employment. There are perils, which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for, in the rate of compensation, as any others. To say, that the master shall be responsible, because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes; but whether he is responsible in a particular case, for their negligence, is not decided by the single fact, that they are, for some purposes, his agents. It seems to be now well settled, whatever might have been thought formerly, that underwriters cannot excuse themselves from payment of a loss by one of the perils insured against, on the ground that the loss was caused by the negligence or unskilfulness of the officers or crew of the vessel, in the performance of their various duties as navigators, although employed and paid

§ 453 *f*. Whether the same rule would apply to a case, where the agents are engaged in different and distinct employments or business

by the owners, and, in the navigation of the vessel, their agents. Copeland *v.* New England Marine Ins. Co. 2 Met. 440-443, and cases there cited. I am aware, that the maritime law has its own rules and analogies, and that we cannot always safely rely upon them in applying them to other branches of law. But the rule in question seems to be a good authority for the point, that persons are not to be responsible, in all cases, for the negligence of those employed by them. If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances. To take the well-known and familiar cases already cited: a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss, it would be extremely difficult for the owner to adduce proof of embezzlement, or other actual fault or neglect, on the part of the carrier, although it may have been the real cause of the loss. The risk is therefore thrown upon the carrier, and he receives, in the form of payment for the carriage, a premium for the risk which he thus assumes. So of an innkeeper; he can best secure the attendance of honest and faithful servants, and guard his house against thieves. Whereas, if he were responsible only upon proof of actual negligence, he might connive at the presence of dishonest inmates and retainers, and even participate in the embezzlement of the property of the guests, during the hours of their necessary sleep; and yet it would be difficult, and often impossible, to prove these facts. The liability of passenger carriers is founded on similar considerations. They are held to the strictest responsibility for care, vigilance, and skill on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story on Bailm. § 590 *et seq.* We are of opinion, that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer." [See also Murray *v.* S. C. R. R. Co. 1 McMullan, 385; McDaniel

by the same principal, is a point upon which there does not seem hitherto to have been any positive adjudication; and the principles

v. Emanuel, 2 Richardson, 455; Coon *v.* Utica and Syracuse R. R. Co. 6 Barb. 231; 1 Seld. 492; King *v.* The Boston & Worcester R. R. 9 Cush. 112; Brown *v.* Maxwell, 6 Hill, 592; Skipp *v.* Eastern Counties Railway Co. 24 Eng. Law & Eq. 397; 9 Exch. 223; Sherman *v.* The Rochester & Syracuse R. R. Co. 15 Barb. 574; Ryan *v.* The Cumberland Valley R.R. 11 Harris, 384; Cook *v.* Parham, 24 Ala. 21; Honner *v.* Ill. Central R.R. 15 Ill. 550; Russell *v.* Hudson River R. R. 17 N. Y. 134. See also Morgan *v.* Vale of Neath R. Co. L. R. 1 Q. B. 149; Tunney *v.* Midland R. Co. L. R. 1 C. P. 291; Sherman *v.* Rochester R. R. Co. 17 N. Y. 153; Degg *v.* Midland R. R. Co. 1 H. & N. 773; Gilshannon *v.* Stony Brook R. R. Co. 10 Cush. 228; Keegan *v.* Western R. R. Co. 4 Seld. 175.

But in Cleveland, &c. R. R. Co. *v.* Keary, 3 Ohio St. 201, it was held that a brakeman who was injured by the carelessness of a conductor on the same train, under whose command and control he was, could recover damages from the corporation, as they were not fellow-servants. Ranney, J., said: "But it is very confidently claimed that this view of the law is at variance with all the adjudged cases in England and in this country, — not only with the decisions of every court, but with the opinion of every judge of those courts. We are referred, in proof of this position, to the cases of Priestley *v.* Fowler, 3 M. & W. 1; Hutchinson *v.* The York, N. & B. Railway, 5 Ex. 343, and Wigmore *v.* Jay, Ib. 354, decided by the English Court of Exchequer; Murray *v.* The South Carolina R. R. Co. 1 McMullan, 385, by the Court of Appeals of that State; Farwell *v.* The Boston & Worcester R. R. Co. 4 Met. 49, and Hayes *v.* The Western R. R. Co. 3 Cush. 270, by the Supreme Court of Massachusetts; and Coon *v.* The Utica & Syracuse R. R. Co. 1 Seld. 492, by the Court of Appeals in New York. We entertain the highest respect for these courts, and their undivided opinions upon any question arising upon the principles of the common law, would cause us to hesitate long before we differed from them. But even upon such a question, we should be compelled to follow the dictates of our own understandings; and the more especially should we feel at perfect liberty to do so, when they did not profess to base their decisions upon any settled principle of law, but undertook to declare a new rule for their action. If such a rule did not seem to us consistent with the analogies of the law, and calculated to promote justice, we should feel bound to reject it. Upon this question, we find no occasion to depart from established principles. It lies upon those who deny the defendant in error the benefit of these principles, to show some good reason for the exclusion. We have carefully examined all these cases, and can find in none of them any such reason, or any denial of the principle upon which we base this decision. While we cannot approve all that is said in some of them, no one of them has determined the question now before us. Priestley *v.* Fowler was decided in 1837, and is the first case to be found in the English books where the limitation of the liability of the master is even hinted at. The action was brought by a servant against his master, for the negligence of another servant in overloading a *van*, by which the plaintiff was injured. It was held the action could not be maintained. It is unnecessary to examine, at any length, the other cases decided in that court. Upon a similar state of facts, they each follow and affirm the doctrine of Priestley *v.* Fowler. As these cases were decided upon no settled principle

asserted in the other case, where the employment or business is the same, do not necessarily govern it. Suppose two ships, owned by the

of the common law, but upon general principles, with a view to consequences, I may be permitted to refer to the opinion of another court equally learned and able, sitting in the same kingdom, and subject to review, if I am not mistaken, in the same ultimate tribunal. In the case of Dixon *v.* Ranken (1 Am. Railway Cases, 569), determined by the highest court in Scotland, as late as 1852, the doctrines of the English cases were repudiated, and an exactly contrary decision made. Such is the diversity of opinion, not only as to the existence of the doctrine, but also as to its justice and propriety, found to obtain in two of the learned courts in Great Britain; both uncontrolled by any statutory regulation, or other consideration peculiar to the system of law administered by either; but each determining the obligation arising from a relation, founded upon contract, which must be the same in England and Scotland. The case of Murray *v.* The S. C. R.R. 1 McMullan, 385, was decided in 1841. The plaintiff was a fireman, and was injured by the carelessness of the engineer. A majority of the court held that he could not recover. The next case in order of time, is that of Farwell *v.* The Boston & Worcester R.R. 4 Met. 49. The plaintiff, an engineer on the defendant's road, was injured by the negligence of a switch-tender. His right to recover against the company, was denied in a very ingenious opinion by C. J. Shaw; in which the general proposition is maintained, that a master who uses due diligence in the selection of competent servants, and furnishes them with suitable means to perform the service in which he employs them, is not liable for the carelessness of one resulting in injury to another, while both are engaged in the *same service*. Of judicial determinations, he was able to bring to his support only the cases of Priestley *v.* Fowler, and Murray *v.* The S. C. R.R.; and characterizing it 'as in some measure a nice question,' he says, 'We would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle.' That it was not intended, by this decision, to foreclose the question now before us, is evident from the later case of Hayes *v.* The Western R.R. 3 Cush. 270, in which the negligence charged was that of a brakeman, acting, as was claimed, *pro tempore*, as conductor; and it was argued, that, although the company were not liable to a laborer, for the neglect of another laborer, yet they were answerable for the neglect of an officer, such as the conductor was. The court expressly declined expressing any opinion upon the soundness of this distinction, and held that it did not properly arise upon the facts of the case. The case of Coon *v.* The Utica & Syracuse R. R. 1 Seld. 492, was brought by a trackman, employed by the defendants to keep a certain portion of their road in order, who claimed to have been injured by the negligence of the managers of a train running upon the road. The court considered the case governed by the authorities to which I have referred, and especially the one from Metcalf, and gave judgment for the defendants. And upon a question like this, what is good sense at Westminster is good sense at Edinburgh, or wherever else parties may contract. Tested in this manner, it seems to us clear, in a case like the present, that as between the company and those employed to labor in subordinate situations under the control of a superior, two distinct classes of obligations arise, — the one resting upon the company, and the other upon the servants, — and both founded upon what each, either expressly or impliedly, has agreed to do in execution of the contract.

same person, and engaged in different voyages, and by a collision between them, caused by the negligence of the master of one, the master of the other should receive a grievous injury in his person or property, would he have no redress against the principal upon the ground of the maxim, *Respondeat superior?* Suppose a commission-mer-

It is the duty of the company to furnish suitable machinery and apparatus, and, as they reserve the government and control of the train to themselves, and intrust no part of it to *these* servants, to control it and them with prudence and care. As the necessity for this prudence and care is constant and continuing, the obligation is performed only when it is constantly exercised, and they cannot rid themselves of it by devolving this power upon the conductor. If they intrust him with its exercise, in the language of Judge Story, they 'in effect warrant his fidelity and good conduct.' It is the duty of the servants to obey the orders of the superior thus placed over them, and to perform as he shall direct. If they fail to do this, and injure each other, they violate their engagements to the company, and are alone answerable for the wrongs they may do. In such case there is no failure of the company to do what, as between them and these servants, it was understood they should do, when the servants entered the service. But they cannot be made to bear losses arising from carelessness in conducting the train, over which their employer gave them no power or control, either separately or collectively, until we are prepared to say that justice and public policy require the consequences of duty omitted by one party to be visited upon the other, although stripped of all power to prevent such consequences." This case has been followed in but few cases, and those of doubtful value. See O'Donnell *v.* Alleghany Valley R. R. Co., 50 Pa. St. 490; Little Miami R. R. *v.* Stevens, 20 Ohio, 415 ; Gillenwater *v.* Madison R. R. 5 Port. (Ind.) 339. Most of the decided cases are exactly to the contrary, as, for instance, where a day laborer or carpenter is carried to and from his work by the engine and train of the company, without charge, and receives an injury, while on the way, through the negligence of the engineer of the train, it has been held that the company are not liable. Gilshannon *v.* Stony Brook R. R. Co., 10 Cush. 228; Seaver *v.* Boston, &c. R. R. Co., 14 Gray, 466; Morgan *v.* Vale of Neath R. Co., L. R. 1 Q. B. 149; O'Connell *v.* Baltimore R. Co., 20 Md. 212. And the following have been held to be fellow-servants within the rule; viz., a brakeman and inspector of machinery and rolling stock, Wonder *v.* Baltimore, 32 Md. 418: the conductor of a construction train and one of the laborers employed on it, McGowan *v.* St. Louis R. R. Co., 61 Mo. 528: a brakeman and a signal-man, Moran *v.* N. Y. R. R. Co., 3 N. Y. 770: a conductor travelling as another to his work, Manville *v.* Cleveland R. R. Co., 11 Ohio St. 417: an engineer, brakeman, and shoveller, St. Louis R R. Co. *v.* Britz, 72 Ill. 256: a fireman and a master machinist, Columbus R. R. Co. *v.* Arnold, 31 Ind. 174 [overruling Fitzpatrick *v.* New Albany R. R. Co., 7 Ind. 436]: a switch-tender and a locomotive engineer, Farwell *v.* Boston, &c. R. R. Co., 4 Met. 49: a conductor or engineer and brakeman on same train, Dow *v.* Kansas Pac. R. R. Co., 8 Kan. 642; Summerhays *v.* Same, 2 Col. 484; Ragsdale *v.* Memphis R. R. Co., 59 Tenn. 426: the engineer and shovellers on a gravel-train, Ohio, &c. R. R. Co. *v.* Tindall, 13 Ind. 366: a station-master and engineer of a train, Evans *v.* Atlantic R. R. Co., 62 Mo. 49. See 2 Thompson on Negligence, 1039 *et seq.* — Ed.]

chant, employed by the owner to sell goods for him in Boston, should embark in a steamboat owned by the same person, for New York, on his own private business, and, in the course of the voyage, he should suffer great personal injury from the gross carelessness of the master of the steamboat; would it be a good answer to an action brought by him against the owner, that he was the agent of the latter, as well as the master? Suppose a foreign factor should embark his own private goods in a ship belonging to the principal, paying therefor the customary freight for the carriage of the like goods, and during the voyage, by the gross negligence of the master of the ship, the goods should be damaged or destroyed; would the owner be exempted from all liability therefor? Suppose a carpenter, employed to build a house for the owner of a stage-coach, should, in travelling in the coach, paying the usual fare, by the overturning of the coach through the gross negligence of the coachman, have his limbs fractured, would the owner be free from all liability, and the suit lie solely against the wrong-doer? These questions are propounded for the mere purpose of showing that there are, or may be, intrinsic difficulties and inconveniences in pressing the doctrine, resulting from the relation of agency, to such a large extent.[1]

[1] [It seems well settled, however, that a railway company is not liable for an injury to one of its servants, occasioned by the negligence of other servants, in running another train into the one on which the plaintiff was riding, so that he was injured. Thus, a brakeman on one train injured by a collision caused by the negligence of a brakeman on another train, cannot recover damages from the company, as they are fellow-servants. Hayes *v.* Western R. Co., 3 Cush. 270; McDermott *v.* Pacific R. R. Co., 30 Mo. 115; Louisville R. Co. *v.* Robinson, 4 Bush, 507; Pittsburgh R. Co. *v.* Devinney, 17 Ohio St. 197; Hutchinson *v.* York, &c. Railroad Co., 5 Exch. 343, in which see able opinion of Baron Alderson; Whoalan *v.* Mad River R. R. Co., 8 Ohio St. 249. See also Sherman *v.* Rochester, &c. R. R. Co., 15 Barb. 574; Ryan *v.* Cumberland Valley R. R. Co., 11 Harris, 384; Gillshannon *v.* Stony Brook R. R. Co., 10 Cush. 228.

Not Fellow-Servants. — But where a railroad company employ a contractor to repair a bridge for a specified sum, and he employs laborers to work thereon by the day, the latter are not the servants of the company, and if they are injured while at work on the bridge, by the negligence of those in charge of a passing train, they can recover from the company. Young *v.* N. Y. Central R. R. Co., 30 Barb. 229. So, where A., a servant of T. & Co., was employed by R. to carry cotton to a warehouse, and was injured by the negligence of R.'s porters, in lowering cotton from the upper floor of his warehouse, it was held that he could sue and recover damages from R. Abraham *v.* Reynolds, 5 H. & N. 143. See Vose *v.* Lancashire, &c. R. Co., 2 H. & N. 728. So, where two railroad companies used the same station, which belonged to one of them, and the servants of both were subject to the same regulations and to the control of the station-master of the owner, it was held, that they were not fellow-

§ 454. This liability of the principal for the misfeasances, and negligences, and torts of his agents and servants, extends not only to

servants, and that the servant of one company could sue the other company for damages caused by the negligence of the latter's servants. Warburton *v.* Gt. West. R. Co., L. R. 2 Exch. 30.

Liability for Defective Machinery. — An employer who provides the machinery for the use of his servants must see that it is suitable and not dangerous; but if an injury happens to a workman by reason of a defect unknown to him, and which his employer by the use of ordinary care could have cured, the employer is liable for the injury. McGatrick *v.* Wason, 4 Ohio St. 566; Paterson *v.* Wallace, 1 Macq. H. L. Cas. 748; Dillon *v.* Un. Pac. R. R. Co., 3 Dill. 319; Hayden *v.* Smithville Man. Co., 29 Conn. 549; Walsh *v.* Pelt Valve Co., 110 Mass. 23; Booth *v.* Boston, &c. R. R. Co., 67 N. Y. 593. If, however, the defective character of the machinery is not known to the employer, and the servant is injured thereby, the principal is not liable. Strange *v.* McCormack, 1 Phila. 156; Gibson *v.* Pacific R. R. Co., 46 Mo. 163; unless the master ought to have known of the defect, and the employee did not know it or had not the means of knowledge. Hayden *v.* Smithville Man. Co., 29 Conn. 548. And if the employer knows of the defect, or if his ignorance is the result of his own negligence, he is liable for the consequences. McMillan *v.* Saratoga &c. R. R. Co., 20 Barb. 449; Noyes *v.* Smith, 28 Vt. 29; Perry *v.* Marsh, 25 Ala. 659; Noyes *v.* Rutland, &c. R. R. Co., 1 Williams, Vt. 110. As, where a fireman, employed by a railroad company, was injured by the bursting of a boiler known to the employer to be defective. Keegan *v.* Western R. R. Co., 4 Seld. 175; Williams *v.* Clough, 3 H. & N. 258; Roberts *v.* Smith, 2 H. & N. 213; Brydon *v.* Stewart, 2 Macq. 30; Griffiths *v.* Gidlow, 3 H. & N. 648; Byron *v.* N. Y. State Printing Co., 26 Barb. 39; but see Assop *v.* Yates, 2 H. & N. 768. And where in a sugar refinery the owner, from motives of economy, substituted a new kind of machinery, and the servant in using it was injured, it was held he could not recover, for if the new machine was dangerous, the servant knew the fact as well as the master, and assumed the risks of the position. Dynen *v.* Leach, 40 Eng. L. & Eq. 491. It is the duty, however, of an employer to fence dangerous machinery, and where his servant was injured by an unprotected wheel, he was held to be liable. Button *v.* Great West. Cotton Co., L. R. 7 Exc. 130. See Hough *v.* Railway Co., 100 U. S. 213; McMahon *v.* Henning, 14 Am. Law Rev. 800; King *v.* Boston, &c. R. R. Co., 9 Cush. 112; Sullivan *v.* M. & M. R. R. Co., 11 Iowa, 421; Holmes *v.* Clarke, 6 H. & N. 349.

Unfit Fellow-Servant. — And if a master has failed to exercise ordinary care in the selection of his servants, he is responsible for the result of not employing servants of ordinary skill and care on the work upon which they are engaged, and if a fellow-servant is thereby injured, the master is responsible, even if both are engaged about his business. Wiggett *v.* Fox, 11 Exch. 832; Tarrant *v.* Webb, 18 C. B. 796; Wright *v.* N. Y. Centr. R. R., 28 Barb. 80; Couch *v.* Watson Coal Co., 46 Iowa, 17; Gilman *v.* Eastern R. R. Co., 13 Allen, 433; Chapman *v.* Erie R. Co., 55 N. Y. 579; Hardy *v.* Carolina R. R. Co., 76 N. C. 5; Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146. And it is the duty of the employer to discharge a servant as soon as his incompetency is discovered. Columbus, &c. R. Co. *v.* Troesch, 68 Ill. 545; Michigan Centr. R. R. Co. *v.* Dolan, 32 Mich. 510; Houston, &c. R. Co. *v.* Oram, 49 Tex. 341.

Injury to Strangers or Volunteers. — Where a stranger is called in to assist

the injuries and wrongs of the agent, who is immediately employed by the principal in a particular business, but also to the injuries and wrongs done by others, who are employed by that agent under him, or with whom he contracts for the performance of the business; for the liability reaches through all the stages of the service.[1] Thus, for example, where the owner of a house employed an agent to repair the house for a stipulated sum; and the latter contracted with C. to do the work, and with D. to furnish the materials; and D.'s servant, by negligently leaving the materials in the road, occasioned an injury to the plaintiff; he was held entitled to maintain an action for damages therefor against the owner.[2] So, where a warehouseman em-

by the foreman or superintendent of a master, and while so engaged is injured by the negligence of such foreman, he may recover damages of the master. As, where a track-master of a railroad company employed the plaintiff to help him keep the tracks clear of snow, and agreed to notify him of the approach of trains, but failed to do so, and the plaintiff was injured, the company was held to be liable. Bradley *v.* N. Y. &c. R. Co., 62 N. Y. 99. But a volunteer who gratuitously assists a servant cannot recover from the master damages for an injury caused by the servant's negligence. Osborne *v.* Knox, &c. R. Co., 68 Me. 49. Thus, where the servants of a railway company were turning a truck on a turn-table, and a person not in employment of the company volunteered to assist, and while so engaged other servants of the company negligently propelled a steam-engine and caused the death of the volunteer, it was held that the company were not liable therefor. Degg *v.* Midland R. Co., 1 H. & N. 376.

But where a party is assisting the master's servants at their request, or for the purpose of expediting his own business, he is not a mere volunteer, and the rule does not apply. Thus, in Holmes *v.* North-eastern R. Co., L. R. 4 Ex. 254; 6 Ex. 123, the plaintiff came to get a load of coal from the railroad company, and the usual place of delivery being crowded, he went, by consent of the station-master, to another place, and while so doing fell into a hole and was injured, and he was held to be a licensee and could recover. So, in Wright *v.* North-eastern R. R. Co., L. R. 1 Q. B. 252; 10 Q. B. 298, the plaintiff shipped a heifer by the defendant corporation to one of their stations, and on its arrival, there being an insufficient number of porters to unload the box containing the heifer, and to save time the plaintiff assisted in unloading it, and while doing so was run over by a train, the company were held liable to him for his injuries; but see Potter *v.* Faulkner, 1 Best & Sm. 800. — Ed.]

[1] [See Reeves *v.* State Bank, 8 Ohio St. 476.]

[2] Bush *v.* Steinman, 1 Bos. & Pull. 409; Ante, § 322, note; Nicholson *v.* Mounsey, 15 East, 384; Weyland *v.* Elkins, Holt's N. P. 227; s. c. 1 Starkie, 272; Smith on Merc. Law, 69 (2d ed.); Id. pp. 127, 128 (3d ed. 1843). Lord Chief Justice Eyre's opinion, in Bush *v.* Steinman, shows the difficulty of this doctrine, and the grounds on which it is founded. "At the trial," said he, "I entertained great doubts with respect to the defendant's liability in this action. He appeared to be so far removed from the immediate author of the nuisance, and so far removed even from the person connected with the immediate author in the relation of master, that to allow him to be charged for the

ployed a master porter to remove some barrels of flour from his warehouse, and the master porter used his own tackle, and brought

injury sustained by the plaintiff, seemed to render a circuity of action necessary. Upon the plaintiff's recovery, the defendant would be entitled to an action against the surveyor; the surveyor, and each of the sub-contracting parties in succession, to actions against the persons with whom they immediately contracted; and last of all, the lime-burner would be entitled to the common action against his own servant. I hesitated, therefore, in carrying the responsibility beyond the immediate master of the person who committed the injury, and I retained my doubts upon the subject, till I heard the argument on the part of the plaintiff, and had an opportunity of conferring with my brothers. They, including Mr. Justice Buller, are satisfied that the action will lie; and, upon reflection, I am disposed to concur with them, though I am ready to confess, that I find great difficulty in stating with accuracy the grounds on which it is to be supported. The relation between master and servant, as commonly exemplified in actions brought against the master, is not sufficient; and the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do, seems to be too large and loose. The principle of Stone *v.* Cartwright, with the decision of which I am well satisfied, is certainly applicable to this case; but that of Littledale *v.* Lord Lonsdale comes much nearer. Lord Lonsdale's colliery was worked in such a manner by his agents and servants (or possibly by his contractors, for that would have made no difference), that an injury was done to the plaintiff's house; and his Lordship was held responsible. Why? Because the injury was done in the course of his working the colliery; whether he worked it by agents, by servants, or by contractors, still it was his work; and, though another person might have contracted with him for the management of the whole concern, without his interference, yet, the work being carried on for his benefit, and on his property, all the persons employed must have been considered as his agents and servants, notwithstanding any such arrangement; and he must have been responsible to all the world, on the principle of *sic utere tuo, ut alienum non lædas*. Lord Lonsdale having empowered the contractor to appoint such persons under him, as he should think fit, the persons appointed would, in contemplation of law, have been the agents and servants of Lord Lonsdale. Nor can I think that it would have made any difference, if the injury complained of had arisen from his Lordship's coals having been placed by the workmen on the premises of Mr. Littledale; since it would have been impossible to distinguish such an act from the general course of business in which they were engaged, the whole of which business was carried on, either by the express direction of Lord Lonsdale, or under a presumed authority from him. The principle of this case, therefore, seems to afford a ground which may be satisfactory for the present action, though I do not say that it is exactly in point. According to the doctrine cited from Blackstone's Commentaries, if one of a family 'layeth or casteth' any thing out of the house, which constitutes a nuisance, the owner is chargeable. Suppose, then, that the owner of a house, with a view to rebuild or repair, employ his own servants to erect a hord in the street (which being for the benefit of the public, they may lawfully do), and they carry it out so far as to encroach unreasonably on the highway; it is clear that the owner would be guilty of a nuisance; and, I apprehend, there can be but little doubt, that he would be equally guilty, if he had

and paid his own men, and an injury was done to the plaintiff by the falling of a barrel on him, in consequence of the tackle failing,

contracted with a person to do it for a certain sum of money, instead of employing his own servants for the purpose; for, in contemplation of law, the erection of the hord would equally be his act. If that be established, we come one step nearer to this case. Here the defendant, by a contractor, and by agents under him, was repairing his house; the repairs were done at his expense, and the repairing was his act. If, then, the injury complained of by the plaintiff was committed in the course of making those repairs, I am unable to distinguish the case from that of erecting the hord, or from Littledale *v.* Lonsdale, unless, indeed, a distinction could be maintained (which, however, I do not think possible) on the ground of the lime not having been delivered on the defendant's premises, but only at a place close to them, with a view to being carried on to the premises and consumed there. My brother Buller recollects a case, which he would have stated more particularly, had he been able to attend. It was this. A master having employed his servant to do some act, the servant, out of idleness, employed another to do it; and that person, in carrying into execution the orders, which had been given to the servant, committed an injury to the plaintiff, for which the master was held liable. The responsibility was thrown on the principal, from whom the authority originally moved. This determination is certainly highly convenient and beneficial to the public. Where a civil injury of the kind now complained of, has been sustained, the remedy ought to be obvious, and the persons injured should have only to discover the owner of the house, which was the occasion of the mischief; not be compelled to enter into the concerns between that owner and other persons, the inconvenience of which would be more heavily felt, than any which can arise from a circuity of action. Upon the whole case, therefore, though I still feel difficulty in stating the precise principle on which the action is founded, I am satisfied with the opinion of my brothers." See this case commented on in Duncan *v.* Findlater, 6 Clark & Finnelly, 894, 903, 909, 913, by Lord Cottenham, and Lord Brougham, where it seems to have been thought to push the doctrine of the liability of the principal to its fullest extent. Mr. Holt has appended a very able note (p. 229) on this subject, to the case of Weyland *v.* Elkins. The following extract contains some striking illustrations and comments on the doctrine: "The responsibility of the master," says he, "for the acts of his servant, has been extended by recent cases to a length beyond the ordinary course of practice, and which, unless the principle be duly understood, may appear contrary both to reason and the principles of general equity. The question is of very general concern, and the cases rest upon some nice distinctions, which, however subtle and remote, are perfectly consonant with the principles of legal liability; a very different thing from moral criminality. The foundation of this branch of our law, is avowedly in the maxim of the Roman Code (4 Inst. tit. 5), Qui facit per alium, facit per se; namely, that the agency of a servant is but an instrument; and that any man, having authority over the actions of another, who either expressly commands him to do an act, or puts him in a condition of which such act is a result, or by the absence of a due care and control (either previously in the choice of his servant, or immediately in the act itself), negligently suffers him to do an injury, shall be responsible for the act of his servant, as if it were the act of himself. All the cases rest upon the development of this principle. We shall here subjoin some of those main divisions, into which it seems to distrib-

while it was used by the porter's men; it was held, that the warehouseman was liable therefor, and that the men were in point of law

ute itself. 1. The first case of such responsibility is the express command of the master; and here the principle is too obvious to need an explanation. 2. The second head is that of reasonable presumption, or, in legal terms, a general command. Whatever a servant is permitted to do, in the ordinary course of his business, is equivalent to this reasonable presumption and general command. Thus, if an innkeeper employ a drawer who serves his guests with wine injurious to their health, the party injured may bring an action against the master. 1 Roll. Abridg. 95. Upon the same principle, by the common law (till altered by the statute of Anne), if a servant keep his master's fire negligently, so that his neighbor's house be burnt down thereby, an action lies against the master, because the negligence occurred in his service. Otherwise, if the servant, going along the street with a torch, by negligence set fire to the house of a neighbor; for there he is not in his master's immediate service, and must answer the damage personally. Noy's Max. ch. 44. In all such cases, the term in our law books, general command, is equivalent to the words, the general deputation, or voluntary substitution, of the servant for the master, within the line of his particular employ; and, therefore, all the acts of the servant, within such particular line, are very properly regarded as the acts of the master. 3. The third head of such responsibility is, where the absence of a due care and control by a master, either in the previous choice of a servant, or in the immediate act itself, has occasioned an injury to another. In all such cases, the master is legally as well as morally criminal for the act of his servant, and, therefore, becomes a subject of legal as well as of moral imputation. Thus, a chemist, who employs an unskilful apprentice to mix up drugs and vend in his shop, and the master of a stage-coach, employing a negligent driver, are responsible for the acts of their respective servants. Nor does it make any distinction in these cases, whether such injury be the effect of negligence or wilfulness in the servant, so long as it is within the scope of the master's employ. The reason of this is twofold; in the first place, because the master, who alone could know his servant, is bound to make choice of a proper one in every respect, both as to good character, which would exclude such wilfulness, and as to skill, which would exclude such negligence. 4. According to the above definition (that the servant is the deputy of the master only within the limits in which he is employed), the master is not responsible for any act of his servant, which makes no part or connection with his service, and which he might or would have committed without such service, such acts being contemporary only with his service, but not any result from it. For example, if my coachman drive over the leg of another man, I am responsible for the injury; but, if he get off his coach-box and horsewhip a man in the street, it is his act, and not mine. It is nothing which I could foresee or prevent; it is not the result of character, or the absence of any proper quality which I ought, acting with ordinary discretion, to have required in a driver. All the cases under this exception rest upon the same distinction. The injurious act, for which the master is made responsible, must be something growing out of the particular service, and be committed, *quatenus in servitio*. 5. To instance a few more cases. In Bro. Abridg. tit. *Trespass*, pl. 435, it is said: 'If my servant, without my notice, put my beasts in another's land, my servant is the trespasser, and not I; because, by the voluntary putting of the beasts there, without my assent, he gains a special

to be deemed his servants.[1] So, the owner of a ship, who appoints the master, and desires him to appoint, and select, and employ, a

property for the time, and so, to this purpose, they are his beasts.' The reason here given, is an example of the subtlety of our old law-writers, who preferred a reason, however technical and remote, to one more obvious and familiar. In Middleton *v.* Fowler, Salk. 282, Holt, C. J., places the law upon its proper foundation, when he states it, as a general position, 'that no master is chargeable with the acts of his servant, but when he acts in the execution of the authority given him.' In other words, when a servant quits sight of the object for which he was employed, and without reference to his master's business or orders, commits, from his own malice, some wilful and independent act, he is no longer presumed to be acting in pursuance of his general authority as a servant; and, according to the doctrine of Lord Holt, his master is not responsible for the act which he does. Thus, in McManus *v.* Cricket, 1 East, 106, the Court of King's Bench determined, that a master was not liable in trespass for the wilful act of his servant in driving his master's carriage against another; such act being done without the direction or assent of the master; admitting, at the same time, that the master would be liable for any damage occasioned by the negligence and unskilfulness of his servant, whilst in his employ. In the same manner, although the master of a ship is not discharged of his responsibility for the acts of his crew, notwithstanding they are done under the direction of a pilot, who, by the regulations of a statute, supersedes the master, for the time, in the government of the ship; yet, if one of the ship's crew does a wilful act of injury to another ship, without any direction from, or privity with, the master, trespass cannot be maintained against the master, although he was on board at the time. Bowcher *v.* Noidstrom, 1 Taunt. 568; and see the cases referred to in the argument. So, in a later case, Nicholson *v.* Mounsey, 15 East, 384, it was determined, that the captain of a sloop-of-war was not responsible in an action on the case, which is a material distinction, for damages done by running down another vessel; the mischief appearing to have been committed during the watch of the lieutenant, who was upon deck, and had the actual management of the sloop at the time; and when the captain was not upon deck, and was not called by his duty to be there. That case, however, was determined upon this principle: 1st. That the defendant and the lieutenant were equally the servants of a superior, and stationed on board by the same authority. 2d. That the defendant had no power either to appoint or dismiss his officers and crew. 6. With respect to the description of agents and servants, for whose acts the master may be responsible, there is a peculiarity in the English law, which embraces a very wide and extensive relation. In the civil law, the liability was narrowed to the person standing in the relation of a pater familias to the wrong-doer. Dig. Lib. 9, tit. 3. Our law extends not only to cases where the agent is a domestic, but it throws the responsibility upon the principal, from whom the authority, of which the injury is a consequence, originally moved. Thus, where a master, having employed his servant to do some act, and the servant, out of idleness, employed another to do it, and that person, in carrying into execution the orders, which had been given to the servant, com-

[1] Randleson *v.* Murray, 8 Adolph. & Ellis, 109. See also Witte *v.* Hague, 2 Dowl. & Ryl. 33.

proper crew, will be responsible for the negligent acts of the crew, for they are to be deemed his servants for the management and government of the ship.[1] The same principle prevails, where the owner of

mitted an injury to the plaintiff, the master was held responsible. Reported from Buller, J., by Eyre, C. J., in Bush *v.* Steinman, 1 Bos. & Pull. 404. 7. The general proposition, that a person shall be answerable for an injury, which arises in carrying into execution that which he has employed another to do, is perhaps too large and loose; but in the case of Littledale *v.* Lord Lonsdale, 2 H. Bl. 267–269; and in Bush *v.* Steinman, 1 Bos. & Pull. 404, the principle was carried to a great extent. In the former case, the defendant was held responsible for an injury to the plaintiff's horse, done by persons with whom he had contracted (and not merely employed as agents or servants) to work a colliery, on the ground that the colliery was the defendant's property; that it was upon his land; and that the description of persons working it could make no difference in his responsibility. In Bush *v.* Steinman, the decision was this: A., having a house by the road-side, contracted with B. to repair it for a stipulated sum; B. contracted with C. to do the work; and C. with D. to furnish the materials. The servant of D. brought a quantity of lime to the house and placed it in the road, by which the plaintiff's carriage was overturned; it was held, that A. was answerable for the damage sustained. In this case, the court principally relied upon the case of Littledale *v.* Lonsdale. See likewise Stone *v.* Cartwright, 6 T. R. 411; Flower *v.* Adam, 2 Taunt. 314; Payne *v.* Rogers, 2 H. Bl. 350; Leslie *v.* Pounds, 4 Taunt. 649." See also Laugher *v.* Pointer, 5 B. & Cressw. 547, where most of the cases are reviewed; Hughes *v.* Boyer, 9 Watts, 556; Milligan *v.* Wedge, 12 Adolph. & Ellis, 737, 742. [But the authority of Bush *v.* Steinman has been in the modern cases either entirely denied or much doubted. Knight *v.* Fox, 5 Exch. 721; Overton *v.* Freeman, 8 Eng. Law & Eq. 479; Hilliard *v.* Richardson, 3 Gray, 349; Reedie *v.* London & North-western R. R. Co., 4. Wels., H. & G. 244. See Brown *v.* Lent, 20 Vt. 533.]

[1] Per Littledale, J., in Laugher *v.* Pointer, 5 B. & Cressw. 547, 554; per Lord Tenterden, Id. pp. 574–576. [But the owners of a vessel are not liable for the negligence of stevedores employed to unload the cargo by the consignees of the charterers of the vessel, for a gross sum. Linton *v.* Smith, 8 Gray, 147. Thomas, J., there said: "The defendants were the owners of an English vessel called 'The Syphax.' They entered into a charter-party to take a cargo from London, and deliver it alongside of the vessel to the owners in a port of Boston. The consignees of the vessel in Boston, with the consent of the master, made a contract with John and Daniel Hurley, stevedores, to discharge the cargo on to the walk. By this contract, the stevedores were to unload the entire cargo for a certain gross sum, to find all that was necessary therefor, and to make good all damage to the cargo in unloading; the master and crew having nothing to do with it. The business of stevedores is a separate, distinct, well-recognized business in Boston, which the Hurleys had followed for many years. While, under this contract, the stevedores were unloading the vessel, the plaintiff's leg was broken, through negligence of the stevedores or the men in their employ.

"The question is, whether the owners of the vessel are liable for that injury? This question, stated in another form, is, whether the relation existing between the owners of the vessel and the stevedores was that of master and servant,

a farm has it in his own hands, and he does not personally interfere in the management, but appoints a bailiff or hind, who hires other

or contractor and contractee. (The word is a bad one, but there is no substitute.)

"The general rule is, that he who does the injury must respond. The well-known exception is, that the master shall be responsible for the doings of the servant whom he selects, and through whom, in legal contemplation, he acts.

"But when the person employed is in the exercise of a distinct and independent employment, and not under the immediate supervision and control of the employer, the relation of master and servant does not exist, and the liability of a master for his servant does not attach.

"Such, we think, is the case at bar. The Hurleys were exercising a distinct business, under an entire contract for a gross sum. The relation is that of contractor and contractee.

"The law upon this subject has been so recently considered by us in Hilliard *v.* Richardson, 3 Gray, 349, that we content ourselves with referring to two or three cases quite directly in point.

"In the well-known case of Laugher *v.* Pointer, 5 B. & Cressw. 547, the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, the owner of the horses providing a driver, through whose negligent driving an injury was done to the horse of a third person. It was held by Lord Tenterden and Littledale, J., that the owner of the carriage was not liable. Bayley and Holroyd, JJ., dissenting.

"The case of Quarman *v.* Burnett arose in the Exchequer upon the same state of facts as in Laugher *v.* Pointer. The Court of Exchequer adopted and affirmed the view of the law before taken by Lord Tenterden and Mr. Justice Littledale, and held that the owner was not liable; a very elaborate opinion being delivered by Mr. Baron Parke. 6 Mees. & Wels. 499.

"In Milligan *v.* Wedge, 12 Adolph. & Ellis, 737, and 4 P. & Dav. 714, the buyer of a bullock at Smithfield Market employed a licensed drover to drive it from Smithfield. The drover employed a boy to drive. Mischief was occasioned by the bullock, through the careless driving of the boy. It was held by all the judges of the Queen's Bench that the owner of the bullock was not liable.

"There is also a well-considered case in Michigan to the same point. De Forrest *v.* Wright, 2 Mich. 368. A public licensed drayman was employed to haul a quantity of salt from a warehouse, and deliver it at the store of the employer at so much a barrel. While in the act of delivering it, one of the barrels, through the carelessness of the drayman, rolled against and injured a person on the sidewalk. The court held, that the employer was not liable for the injury; the drayman exercising a distinct and independent employment, and not being under the immediate control and supervision of the employer.

"The case of Randleson *v.* Murray, 8 Adolph. & Ellis, 109, and 3 Nev. & P. 239, would seem at first to conflict with the cases before referred to. A warehouseman employed a porter to remove a barrel from his warehouse. The master porter employed his own men and tackle. Through the negligence of the men the tackle failed, and the barrel fell and injured the plaintiff. The warehouseman was held liable. The report does not show whether the porter was acting upon a contract to do the job for a specific sum, or on wages. The case is put, in the decision, on the relation of master and servant. See remarks

persons under him, all of them being paid out of the funds of the owner, and selected by himself, or by a person specially deputed by him; for the owner will be answerable for any damage, which happens through their default, because their neglect or default is his, as they are appointed by and through him.[1] So, in the case of a mine, if the owner employs a steward or manager to superintend the working of the mine, and to hire under-workmen, and he pays them on behalf of the owner; these under-workmen become the immediate servants of the owner, and the owner will be answerable for their default in doing any acts on account of their employer.[2] So, where a corn-factor was absent from his shop, and during his absence, his sister managed his business; and she, wanting to send out some corn to a customer, for this purpose employed a person, who occasionally worked for her brother, and who, at the time of such employment, was in a state of inebriety; and the man so employed, contrary to the practice in the corn-factor's shop, took out the corn on a small warehouse truck, which he negligently left in the road, whereby a person, driving along in a chaise, was injured; it was held that the corn-factor was liable in an action at the suit of the person injured, for this negligent act of the drunken man, upon the ground, that the employment of a drunken man was in itself an act of negligence, and that, by such employment through his agent, the corn-factor set the whole thing in motion, and must, therefore, be liable for the consequences.[3] So, where the owner of land employed a mechanic to make a drain for him on the land, and to extend it therefrom to a public drain, the mechanic procuring the necessary materials, hiring

of Lord Denman, C. J., and Williams, J., in Milligan *v.* Wedge, 12 Adolph. & Ellis, 741, 742, and 4 P. & Dav. 717.

"The distinction upon which these cases and many others referred to and examined in Hilliard *v.* Richardson turns, is, whether the relation of master and servant exists, or that of contractor and contractee. The line of separation may be sometimes indistinct and shadowy, but in the case before us it is sufficiently clear.

"We are of opinion, upon the facts stated, that the owners of the vessel were not liable, and that the exceptions must be sustained." See also Blakie *v.* Stenbridge, 22 Boston Law Rep. 428; Murphey *v.* Caralli, 3 H. & C. 462; Murray *v.* Currie, L. R. 6 C. P. 24. — R.]

[1] Ibid.

[2] Ibid.; Stone *v.* Cartwright, 6 T. R. 415; Littledale *v.* Lord Lonsdale, 2 H. Bl. 267, 269; Bush *v.* Steinman, 1 Bos. & Pull. 404.

[3] Wanstall *v.* Pooley, Mich. Term, 1841, Q. B., cited 6 Clark & Finnelly, 910, note. See also Dunlap *v.* Findlater, 6 Clark & Finnelly, 894, 903, 909, 910.

laborers, and charging a compensation for his services and disbursements; it was held, that the mechanic was to be deemed in the service of his employer, so as to make the employer responsible to a third person, who sustained damage in his property by reason of the want of skill, or want of due care and diligence, on the part of the mechanic, and those employed under him in digging the drain.[1]

[1] Stone *v.* Codman, 15 Pick. 297. It does not appear, that in this case the work was undertaken to be done by the mechanic by the job, or as an independent employment. If it had been, it might have admitted of a very different consideration. See Post, § 454 *a*. [So, where A. employed B., at a stipulated sum, to remove a house from one side of the street to the other, and B. hired all the hands, A. having nothing to do with the operations in moving the building, A. was nevertheless held liable for the negligence of B., in leaving a hole open in the street, whereby the plaintiff's horse was killed. Wiswall *v.* Brinson, 10 Ired. 554. In Stone *v.* Cheshire R. R. Corporation, 19 N. H. 100, where a railroad corporation contracted with certain persons to build a section of the road, and while the contractors or their servants were blasting rocks upon the road, a stone fell upon the plaintiff, and injured him, it was held that he had his remedy against the railroad corporation; and the cases of Bush *v.* Steinman, and Lowell *v.* Boston & Lowell R. R. 23 Pick. 24, were fully approved. So, where the work of pulling down a house and rebuilding it was let to a contractor, and it was his duty in so doing to support the plaintiff's house, which he neglected to do, and it fell down, the defendant was held to be liable on the ground that he was bound to see that such accident did not occur. Bower *v.* Peate, L. R. 1 Q. B. D. 321. The simple fact, however, that the person who did the work was employed by the job, and not by the day, cannot be decisive upon the question of the employer's liability; and if the employer had the power to control the manner in which the work is done, he is responsible for the negligence of the servant who executes it. Sadler *v.* Henlock, 4 El. & Bl. 270; Schular *v.* Hudson R. Railroad, 38 Barb. 653; Morgan *v.* Bowman, 22 Mo. 538; Central R. Co. *v.* Grant, 46 Ga. 417; Brackett *v.* Lubke, 4 Allen, 138; Detroit *v.* Corey, 9 Mich. 165. So, in an action by a workman, against his employer for injuries caused by the falling of a staging on which he had been sent to work by his employer, where it appeared that the staging was insecure because constructed of poor material, and that it was built by those who afterward became the plaintiff's fellow-servants, but not under the direct supervision of the defendant, although he superintended the work generally, the defendant was held to be liable. Arkerson *v.* Dennison, 117 Mass. 407. Where the employer retains the control and direction over the mode and manner of doing the work, and an injury results from the negligence of the contractor, or his servant, or agent, the employer is liable. Cincinnati *v.* Stone, 5 Ohio St. 38. See Clark *v.* Vermont, &c. R. R. Co., 28 Vt. 103; Pawlet *v.* Rutland, &c. R. R. Co., Id. 297; Blackwell *v.* Wiswall, 24 Barb. 355; Ladd *v.* Chotard, 1 Minor (Ala.), 366; Felton *v.* Deall, 22 Vt. 170. And in Burgess *v.* Gray, 1 Com. B. 578, the defendant had employed one Palmer to make a drain from his house to the street sewer, and Palmer's men left a pile of dirt in the street, whereby the plaintiff was injured; but the jury having found, upon the evidence, that the defendant had not completely parted with the control over the work, the Court of Common Pleas held him legally liable for the injury, although Palmer was doing the work by contract, and

§ 454 a. But here again nice questions have arisen in the application of this last doctrine to cases of sub-agency, where the facts presented the inquiry, when, and under what circumstances, the parties employed are to be deemed the servants or sub-agents of the principal employer, and when only the sub-agents of the immediate person, by whom they are actually employed. In the former case, the principal employer is liable for their negligent acts; in the latter, not. Some cases may be put to illustrate the embarrassments which occasionally surround the subject, and perhaps make it difficult to lay down any positive rule of distinction, applicable to all the varieties of human transactions. In one case, a builder was employed by a committee of a club to make extensive alterations and improvements in the club-house, and, among other things, to prepare and fix the necessary gas-fittings. The builder made a sub-contract with a gas-fitter, to execute the latter portion of the work, by whom, or whose servants, it was performed in such a negligent manner that the gas exploded, and seriously injured the plaintiff and his wife. A suit was brought against the builder; and the question arose whether he was responsible for the injury. It was held, that he was not, because the gas-fitter did not stand to him in the relation of a servant, but was a mere sub-contractor.[1] In another case, where the buyer of a bullock employed a licensed drover to drive it from Smithfield, in London, to his slaughter-house, without the city; and, by the by-laws of the city, no person but a licensed drover can drive cattle for hire from Smithfield, though the owner may drive them himself; the drover employed a boy to drive the bullock to the slaughter-house; and the bullock did the mischief complained of, while the boy was driving him; it was held, that the boy was not the servant of the butcher, and, therefore, he was not liable for the negligent acts of the boy.[2] The ground of these decisions seems to have been, that, where the party employed by the principal exercises a distinct and inde-

was himself a master-builder. Darmstaetter *v.* Moynahan, 27 Mich. 188. And a person who employs a contractor to do a particular act is liable for the injurious acts of the contractor which spring from the fulfilment of the contract. Pitts *v.* Kingsbridge Highway Board, 19 W. R. 884. See Corbin *v.* American Mills, 27 Conn. 274. So, the proprietor may make himself liable by interfering with the contractor and assuming control of the work, or of part of it. Gilbert *v.* Beach, 16 N. Y. 606; Heffernan *v.* Benkard, 1 Robt. 432; Griffiths *v.* Wolfram, 22 Minn. 183. And see Peachey *v.* Rowland, 16 Eng. Law & Eq. 442. — Ed.]

[1] Rapson *v.* Cubitt, 9 Mees. & Wels. 710. See also Winterbottom *v.* Wright, 10 Mees. & Wels. 109, 111.

[2] Milligan *v.* Wedge, 12 Adolph. & Ellis, 739. [See Sadler *v.* Hancock,

pendent employment, he, and the persons whom he employs under him, are not to be deemed the servants of the principal, but he stands in the relation of a sub-contractor only, and the persons employed by him are his own servants.[1]

4 El. & Bl. 570. And a principal is not responsible for the wrongful acts of a sub-agent, who is subject only to the control of the agent. Lindsay *v.* Singer Man. Co., 4 Mo. App. 570. Thus, a station-master was held not to be liable for the defalcation of a sub-agent. Louisville &c. R. R. Co. *v.* Blair, 1 Tenn. Ch. 351. But where a person erects a building by contract, and employs a clerk of works to superintend the erection, he is not liable for an injury to a workman in building, by reason of its negligent construction, unless he appointed a negligent clerk with the knowledge of his incompetency. Brown *v.* Accrington Cotton Co., 3 H. & C. 511. So, where the workmen of a contractor to build a bridge for a railroad company negligently allowed a stone to fall from the bridge upon a person passing under it, it was held that the railroad was not liable. Reedie *v.* London & North-western Railway Co., 4 Wels., Hurl. & Gordon, 244; see Cuthbertson *v.* Parsons, 10 Eng. Law & Eq. 452; Buffalo *v.* Holloway, 3 Seld. 493; Hickock *v.* Plattsburgh, 16 N. Y. 161; Kelly *v.* New York, 1 Kernan, 432; Storrs *v.* Utica, 17 N. Y. 107; Blake *v.* Ferris, 1 Seld. 48; Pack *v.* Mayor of New York, 4 Seld. 222. — Ed.]

[1] See Milligan *v.* Wedge, 12 Adolph. & Ellis, 737, and particularly what was said by Lord Denman, and by Mr. J. Williams. See also Martin *v.* Temperley, 4 Q. B. 298; The Jurist, Feb. 25, 1843, No. 320, p. 150. See The Agricola, Id. pp. 157, 159. [This general rule seems well settled, that one who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work free from the control of the employer, and according to his own methods, will not be liable for the torts of such contractor, his subcontractors, or his servants. Morgan *v.* Bowman, 22 Mo. 538; Blake *v.* Ferris, 5 N. Y. 48; Coomes *v.* Houghton, 102 Mass. 211; Allen *v.* Willard, 57 Pa. St. 374; Butler *v.* Hunter, 7 H. & N. 826. Thus, where the defendants contracted to pave a highway, but sub-contracted with B. to pave a portion thereof, and B.'s men negligently left a pile of stones in the street, over which the plaintiff fell, and was injured, it was held, that the defendants were not liable. Overton *v.* Freeman, 11 C. B. 867. So, where A. was employed by the defendant to fill in the earth over a drain leading from the house to the main sewer, and A.'s men left the earth piled up so high that the plaintiff drove against it and was injured, it was held, that the defendant was not liable. Peachey *v.* Rowland, 13 C. B. 182. So, where a railroad company contracted with A. to build a branch line, and A. contracted with the defendant to erect a tubular bridge, and the defendant contracted with C. to provide the necessary scaffolding and lights, and the plaintiffs fell over one of the poles of the scaffolding, in consequence of the want of light in the street, it was held that C. was responsible, and not the defendant. Knight *v.* Fox, 5 Exch. 721. So, where a railroad company contracted with B. to excavate a road, and the work was done under the general superintendence of the company's surveyor, who furnished the plans, but B.'s foreman decided how the plans and directions of the surveyor should be carried out, and the surveyor gave a certain order, which B.'s foreman did not follow, but gave a different order, whereby the plaintiff's property was injured, it was held, that the railroad company was not liable. Steel *v.* South-eastern Railw. Co., 16 C. B. 550. So, where the owner of a house employed a carpenter to raise and add

§ 455. The liability of the principal to third persons, for the misfeasances, negligences, and torts of his agents and servants, may also

another story to his building, and the carpenter was to furnish all the material, and do the whole work for a fixed sum, it was held that the employer was not responsible for the negligence of the carpenter, whereby his house fell upon his neighbor's house, and injured it. Conners *v.* Hennessey, 112 Mass. 96; Robinson *v.* Webb, 11 Bush (Ky.), 464. So, where the defendant employed master mechanics to do a job under his agent's general direction, each to furnish men, tools, and tackle necessary for his work, he is not responsible for an injury suffered by a servant of one master mechanic from the negligence of another in furnishing imperfect tackle, or in his manner of using it. Harkins *v.* Standard Sugar Refinery, 122 Mass. 400; Arkerson *v.* Dennison, 117 Mass. 407; Johnson *v.* City of Boston, 118 Mass. 114; but see Gray *v.* Pullen, 5 B. & S. 970; Hole *v.* Sittingbourne, &c. R. R. Co., 6 H. & N. 488; but where the contractor is intrusted with the performance of any duty, which it is incumbent upon the employer to do himself, the latter will be liable for the contractor's negligence therein. Pickard *v.* Smith, 10 C. B. N. S. 470; Whiteley *v.* Pepper, L. R. 2 Q.B. D. 276. And where a person is employed to do an unlawful act, by which an injury is occasioned to a third person, the employer is liable therefor, although the person employed is a contractor, and the act is that of his servants. Ellis *v* Sheffield Gas Co., 2 L. & Bl. 767; Congreve *v.* Smith, 18 N. Y. 79; Creed *v.* Hartman, 29 N. Y. 591; Cuff *v.* Newark R. Co., 35 N. J. L. 17, 574; Robbins *v.* Chicago, 4 Wall. 657; Water Co. *v.* Ware, 16 Wall. 566; Clark *v.* Fry, 8 Ohio St. 358. Where under a contract to blast rock, large fragments of stone were thrown against plaintiff's house, the employer was held to be liable. Carman *v.* Steubenville, 4 Ohio St. 399. So, where the contract provides for a wall of insufficient thickness, which falls down. Treadwell *v.* N. Y., 1 Daly, 123. And in Hilliard *v.* Richardson, 3 Gray, 349, where the plaintiff's horse was frightened by a pile of boards left in the street by one Shaw, who had contracted with the defendant to make an alteration in the defendant's building, the whole question treated in this section is elaborately discussed, and the authorities carefully criticised in the judgment of the court delivered by Thomas, J. He said: "The questions raised by the report are upon the instructions given by the presiding judge to the jury. The material question, that upon which the case hinges, is whether, upon the facts reported, the defendant is liable for the acts and for the negligence and carelessness of Shaw. In looking upon the case reported, it is to be observed: 1st. That the acts done by Shaw, and which are charged as negligence, were not done by any specific direction, or order, or request of the defendant. 2dly. That between the defendant and Shaw the ordinary relation of master and servant did not exist. 3dly. That the acts done, and which are charged as negligence, were not done upon the land of the defendant. They did not consist in the creating or suffering of a nuisance upon his own land, to the injury of another. 4thly. That the boards placed in the highway were not the property of the defendant; that he had no interest in them, and could exercise no control over them. 5thly. That the defendant did not assume to exercise any control over them. 6thly. That there is no evidence of any purpose on the part of the defendant to injure the plaintiff, or anybody else, or so to use his property, or suffer it to be so used, as to occasion an injury. Was the defendant liable for the negligent acts of Shaw in the use of the highway? As a matter of reason and justice, if the question were a new one, it would be difficult to see on what

arise, although the act is not done, or the wrong is not committed, within the scope of the ordinary business of the principal, if it is

solid ground the claim of the plaintiff could rest. But he says that such is the settled law of this Commonwealth, and that the question is now no longer open for discussion. Three cases are especially relied upon by the plaintiff, as settling the rule in Massachusetts. They are Stone *v.* Codman, 15 Pick. 297; Lowell *v.* Boston & Lowell Railroad, 23 Pick. 24; and Earle *v.* Hall, 2 Met. 353. The case of Earle *v.* Hall, 2 Met. 353, is the third case cited by the plaintiff as affirming the doctrine upon which he relies. Hall agreed to sell land to one Gilbert. Gilbert agreed to build a house upon and pay for the land. While the agreement was in force, Gilbert, in preparing to build the house on his own account, by workmen employed by him alone, undermined the wall of the adjoining house of the plaintiff. It was held that Hall was not answerable for the injury, although the title to the land was in him at the time the injury was committed. The general doctrine is stated to be, that we are not merely to inquire who is the general owner of the estate, in ascertaining who is responsible for acts done upon it injurious to another; but who has the efficient control, for whose account, at whose expense, under whose orders is the business carried on, the conduct of which has occasioned the injury. The case of Bush *v.* Steinman is cited as a leading case, 'very peculiar, and much discussed;' but we do not perceive that the point it decides is affirmed. The general scope of the reasoning in Earle *v.* Hall, as well as the express point decided, are adverse to it. These cases, neither in the points decided, nor the principles which they involve, support the rule contended for by the plaintiff. But the plaintiff says that the well-known case of Bush *v.* Steinman is directly in point, and that that case is still the settled law of Westminster Hall. If so, as authority, it would not conclude us; though, as evidence of the law, it would be entitled to high consideration. Upon this case of Bush *v.* Steinman three questions arise: 1. What does it decide? 2. Does it stand well upon authority or reason? 3. Has its authority been overthrown or substantially shaken and impaired by subsequent decisions? 1. The case was this: A., having a house by the road-side, contracted with B. to repair it for a stipulated sum; B. contracted with C. to do the work; C. with D. to furnish the materials; the servant of D. brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned. Held, that A. was answerable for the damage sustained. 2. At the trial, Chief Justice Eyre was of opinion that the defendant was not answerable for the injury. In giving his opinion at the hearing *in banc*, he says he found great difficulty in stating with accuracy the grounds on which the action was to be supported; the relation of master and servant was not sufficient; the general proposition, that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do, seemed to be too large and loose. He relied, as authorities, upon three cases only: Stone *v.* Cartwright, 6 T. R. 411; Littledale *v.* Lonsdale, 2 H. Bl. 267; and a case stated upon the recollection of Mr. Justice Buller.

"Stone *v.* Cartwright lays no foundation for the rule in Bush *v.* Steinman. The decision was but negative in its character. It was that no action would lie against a steward, manager, or agent for the damage of those employed by him in the service of his principal. This is the entire point decided. Lord Kenyon said: 'I have ever understood that the action must be brought against

done or committed by the previous command, or with the subsequent assent, adoption, or ratification of the principal. Thus, if the prin-

the hand committing the injury, or against the owner for whom the act was done.' The injury complained of was done upon the land of the defendant, and by his servants. It consisted in so negligently working the defendant's mine as to undermine the plaintiff's ground and buildings above it, so that the surface gave way. The mine was in the possession and occupation of the defendant; the injury was direct and immediate; the workmen were the servants of the owner. The case of Littledale *v.* Lonsdale, in its main facts, cannot be distinguished from Stone *v.* Cartwright. It stands upon the same grounds. The defendant's steward employed the under-workmen. They were paid out of the defendant's funds. The machinery and utensils belonged to the defendant, and all the persons employed were his immediate servants. The third case was but this: A master having employed his servant to do some act, this servant, out of idleness, employed another to do it; and that person, in carrying into execution the orders which had been given to the servant, committed an injury to the plaintiff, for which the master was held liable. What was the nature of the acts done does not appear. And whether the case was rightly decided or not, it is difficult to see any analogy between it and the case the Lord Chief Justice was considering. Mr. Justice Rooke, in addition to the cases of Stone *v.* Cartwright, and Littledale *v.* Lonsdale, alluded also to the case of Michael *v.* Alestree, 2 Lev. 172, in which it was held that an action might be maintained against a master for damage done by his servant to the plaintiff in exercising his horses in an improper place, though he was absent, because it should be intended that the master sent the servant to exercise the horses there. See Parsons *v.* Winchell, 5 Cush. 595. The examination of these cases justifies the remark that Bush *v.* Steinman does not stand well upon the authorities, and is not a recognition of principles before that time settled. The rule it adopts is apparently for the first time announced. Does it stand well upon the reasoning of the court? We think all the opinions given in it lose sight of these two important distinctions: In the cases cited and relied upon, the acts done, which were the subjects of complaint, were either acts done by servants or agents, under the efficient control of the defendants, or were nuisances created upon the premises of the defendants to the direct injury of the estate of the plaintiffs. The servant of the lime-burner was not the servant of the defendant; over him the defendant had no control whatsoever; to the defendant he was not responsible. There was no nuisance created on the defendant's land. It does not appear that the defendant owned the fee of the highway. The case is put on the ground that the lime was put near the premises of the defendant, and with a view of being carried upon them. The lime was not on the defendant's land; he did not direct it to be put there; he had not the control of the man who put it there. Mr. Justice Heath said: 'I found my opinion on this single point; viz., that all the subcontracting parties were in the employ of the defendant.' This is not so, unless it be true that a man who contracts with a mason to build a house employs the servant of the man who burns the lime. Mr. Justice Rooke said: 'The person, from whom the whole authority is originally derived, is the person who ought to be answerable; and great inconvenience would follow if it were otherwise.' It cannot be meant that one who builds a house is to be responsible for the negligence of every man and his servants who undertakes

cipal should direct his agent to commit a trespass, or to make a conversion of the property of a third person, or he should subsequently

to furnish materials for the same. Such a rule would render him liable for the most remote and inconsequential damages. But the act complained of did not result from the authority of the defendant. The authority under which the servant of the lime-burner acted, was that of his master. And neither the lime-burner nor his servant was acting under the authority of the defendant, or subject to his control. The defendant might, with the same reason, have been held liable for the carelessness of the servant who burnt the lime, and of the servant of the man who furnished the coals to burn the lime. 3. Has the doctrine of the case of Bush *v.* Steinman been affirmed in England, or has it been overruled and its authority impaired? The plaintiff cites the case of Sly *v.* Edgley, at *nisi prius*, 6 Esp. 6. The defendant, with others, then owning several houses, the kitchens of which were subject to be overflowed, employed a bricklayer to sink a large sewer in the street. The bricklayer opened the sewer and left it open, and the plaintiff fell in. It was contended that the bricklayer was not the servant of the defendant. He was employed to do a certain act, and the mode of doing it, which had caused the injury, was certainly his own. Lord Ellenborough is reported as saying: 'It is the rule of *Respondeat superior*, what the bricklayer did, was by the defendant's direction.' It does not appear how the bricklayer was employed. If not by independent contract, the case stands very well on the relation of master and servant. A case at *nisi prius*, so imperfectly reported, can have but little weight. Another case at *nisi prius* was that of Matthews *v.* West London Waterworks, 3 Camp. 403, in which the defendants, contracting with pipe-layers to lay down pipes for the conveyance of water through the streets of the city, were held liable for the negligence of workmen employed by the pipe-layers. The case is very briefly stated, and no reasons given by Lord Ellenborough for his opinion reported. It may stand on the ground that the defendants, having a public duty to discharge, as well as right given, could not delegate this trust, so as to exempt themselves from responsibility. This case is alluded to in Overton *v.* Freeman, 11 C. B. 872, hereafter to be examined, where Maule, J., makes the following remarks concerning it: 'That is but a *nisi prius* case; the report is short and unsatisfactory; and the particular circumstances are not detailed.' In Harris *v.* Baker, 4 M. & Selw. 27, and in Hall *v.* Smith, 2 Bing. 156, it was held that trustees or commissioners, intrusted with the conduct of public works, were not liable for injuries occasioned by the negligence of the workmen employed under their authority. These cases stand upon the ground that an action cannot be maintained against a man, acting gratuitously for the public, for the consequences of acts which he is authorized to do, and which on his part are done with due care and attention. They give no sanction whatever to the doctrine of Bush *v.* Steinman. In Randleson *v.* Murray, 8 Adolph. & Ellis, 109, a warehouseman in Liverpool employed a master porter to remove a barrel from his warehouse. Through the negligence of his men the tackle failed, and the barrel fell and injured the plaintiff. Held, that the warehouseman was liable. The case is put distinctly on the relation of master and servant. Lord Denman said: 'Had the jury been asked whether the porters, whose negligence occasioned the accident, were the servants of the defendant, there can be no doubt they would have found in the affirmative.' The injury occurred also in the direct use of the defendant's estate. In Burgess

ratify or adopt the act, when done for his own use or benefit, he will be liable as an original trespasser or wrong-doer.[1] So, although the

v. Gray, 1 C. B. 578, the defendant, owning and occupying premises adjoining the highway, employed one Palmer to make a drain from his land to the common sewer. In doing the work, the men employed by Palmer placed gravel on the highway, in consequence of which the plaintiff, in driving along the road, sustained a personal injury. There was evidence that, upon the defendant's attention being called to the gravel, he promised to remove it. The matter left to the jury was, whether the defendant wrongfully put, or caused to be put, the gravel on the highway. This well-considered case, it is plain, so far from affirming the rule in Bush *v.* Steinman, is carefully and anxiously taken out of it by the counsel and by the court, with the strongest intimation by the latter, that, but for the difference, the action could not be maintained. The latest case in England, referred to in the learned argument of the plaintiff's counsel, as affirming the doctrine of Bush *v.* Steinman, is Sadler *v.* Henlock, in the Queen's Bench (1855), 4 El. & Bl. 570. The defendant, with the consent of the owner of the soil and the surveyor of the district, employed one Pearson, a laborer, but skilled in the construction of drains, to cleanse a drain running from the defendant's garden under the public road, and paid five shillings for the job. Held, that the defendant was liable for an injury occasioned to the plaintiff by reason of the negligent manner in which Pearson had left the soil of the road over the drain. The case is put by all the judges distinctly on the relation of master and servant. The case of Bush *v.* Steinman is not referred to by either of the justices; but the distinction of servant and contractor runs through the whole case, — a distinction which is wholly inconsistent with the doctrine of Bush *v.* Steinman. In Laugher *v.* Pointer, 5 B. & Cressw. 547, and 8 D. & R. 556 (1826), where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to the horse of a third person, it was held by Lord Tenterden, C. J., and Littledale, J., that the owner of the carriage was not liable for such injury; Bayley and Holroyd, Justices, dissenting. This case is, in substance, the one put by Mr.

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[1] Ante, §§ 244, 312, 313; Com. Dig. *Trespass*, C. 1; Bates *v.* Pilling, 6 B. & Cressw. 38; Story on Bailm. §§ 400, 402–404; Co. Litt. 207 *a*. Lord Coke, in 4 Inst. 317, says, that, by "the common law, he that receiveth a trespasser and agreeth to a trespass after it is done, is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment; for, in that case, Omnis ratihabitio retrotrahitur et mandato æquiparatur." [So, if the principal directs his servant to do some act, as to "go and get" a neighbor's horse, expecting that the servant will obtain the owner's permission, but the servant, misunderstanding the direction, takes him without leave, the master is liable for any injury to the horse while used by the servant in his master's business. Moir *v.* Hopkins, 16 Ill. 313. And see May *v.* Bliss, 22 Vt. 477; Fuller *v.* Voght, 13 Ill. 283. So, where the master directs his servant to cut timber on his land in a designated direction, and the servant, not knowing where the lines were, cut on the land of an adjoining owner, the master was held liable. Luttrell *v.* Hazen, 3 Sneed (Tenn.), 20. — R.]

relation of master and servant should not exist in a particular case; yet a party may, by his own conduct, make himself responsible for

Justice Heath, in illustration and support of the judgment in Bush *v.* Steinman. In the opinions of Lord Tenterden and of Littledale, J., the doctrines of Bush *v.* Steinman, in their application to personal property, are examined, and their soundness questioned. In Quarman *v.* Burnett, 6 Mees. & Wels. 499 (1840), the same question arose in the Exchequer as in Laugher *v.* Pointer in the King's Bench, and the opinions of Lord Tenterden and Littledale, J., were affirmed in a careful opinion pronounced by Baron Parke. These cases, however, do not overrule Bush *v.* Steinman, as to the liability of owners of real estate. The case of Milligan *v.* Wedge, 12 Adolph. & Ellis, 737, and 4 P. & Dav. 714 (1840), is also in relation to the use of personal property, and rests upon the rule settled in Quarman *v.* Burnett. But in this case Lord Denman suggests a doubt whether the distinction as to the law in cases of fixed and movable property can be relied on. The case of Rapson *v.* Cubitt, 9 Mees. & Wels. 710 (1842), was this: The defendant, a builder, employed by the committee of a club to make certain alterations at the club-house, employed a gas-fitter, by a sub-contract, to do that part of the work. In the course of doing it, by the negligence of the gas-fitter, the gas exploded and injured the plaintiff. Held, that the defendant was not liable. The reasons upon which this decision is based do not well consist with the rule in Bush *v.* Steinman. The case of Allen *v.* Hayward, 7 Adolph. & Ellis, N. R. 960 (1845), is still more directly adverse. But we pass from these to cases directly in point. In the cases of Reedie & Hobbit *v.* London & North-western Railway, 4 Exch. 244, 254 (1849), the defendants, empowered by act of parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract, reserved to themselves the power of dismissing any of the contractor's workmen for incompetence. The workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath, along the highway, by allowing a stone to fall upon him. In an action against the company, it was held, that they were not liable, the terms of the contract making no difference. In the judgment of the court, given by Baron Rolfe (now Lord Chancellor Cranworth), alluding to the supposed distinction as to real property, the court say: 'On full consideration, we have come to the conclusion that there is no such distinction, unless, perhaps, in cases where the act complained of is such as to amount to a nuisance; and, in fact, that, according to the modern decisions, Bush *v.* Steinman must be taken not to be law, or, at all events, that it cannot be supported on the ground on which the judgment of the court proceeded.' Without sanctioning this doctrine, as it affects a public trust, it is very plain that it directly overrules the doctrine of Bush *v.* Steinman. The case of Knight *v.* Fox, 5 Exch. 721 (1850), is, if possible, a stronger case in the same direction — a decision which it is plain could not have been made if the doctrines of Bush *v.* Steinman were the law of Westminster Hall. There are three cases remaining. In Overton *v.* Freeman, 11 Com. B. 867 (1851), A. contracted to pave a district, and B. entered into a sub-contract with him to pave a particular street. A. supplied the stones, and his carts were used to carry them. B.'s men, in the course of the work, negligently left a heap of stones in the street. The plaintiff fell over them and broke his leg. It was held, that A. was not liable, even though the act complained of amounted to a public nuisance. And Maule, J., said,

the neglect or improper act of the servant. Thus, although the hirer of job-horses and servants will not ordinarily be liable for the negli-

that the case of Bush *v.* Steinman 'has been considered as having laid down the law erroneously.'

"In Peachey *v.* Rowland, 13 Com. B. 182 (1853), the defendants contracted with A. to fill in the earth over a drain which was being made for them across a portion of the highway from their house to the common sewer. A., after having filled it in, left the earth so heaped above the level of the highway as to constitute a public nuisance, whereby the plaintiff, in driving along the road, sustained an injury. The case had this other feature: A few days before the accident, and before the work was finished, one of the defendants had seen the earth so heaped over a portion of the drain; but beyond this there was no evidence that either defendant had interfered with or exercised any control over the work. It was held, there was no evidence to go to the jury of the defendants' liability. Bush *v.* Steinman appears not to have been cited by counsel or alluded to by the court. The still more recent case of Ellis *v.* Sheffield Gas Consumer's Co. 2 El. & Bl. 767 (1853), cited by the counsel for the plaintiff, only determined that a party employing another to do an act unlawful in itself will be liable for an injury such act may occasion — very familiar and well-settled law. Bush *v.* Steinman is no longer law in England. If ever a case can be said to have been overruled, indirectly and directly, by reasoning and by authority, this has been. No one can have examined the case without feeling the difficulty of that clear-headed Judge, Chief Justice Eyre, of knowing on what ground its decision was put. It could not stand on the relation of master and servant. That relation did not exist. It could not stand upon the ground of the defendant having created or suffered a nuisance upon his own land to the injury of his neighbor's property. The lime was on the highway. There is no rule to include it but the indefinitely broad and loose one that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do — a rule which ought to have been and was expressly repudiated. The case of Leslie *v.* Pounds, 4 Taunt. 649, not cited in the argument, has some resemblance to the cases before referred to. This was an action against the landlord of a house leased, who, under contract with the tenant, who was bound to repair, employed workmen to repair the house, and superintended the work. Being remonstrated with by the commissioners of pavements as to the dangerous state of the cellar, he promised to take care of it, and had put up some boards temporarily as a protection to the public. They proved insufficient, and the plaintiff falling through, the landlord was held liable. The case was decided on the ground that the landlord was making the repairs, and that the workmen were employed by him, and were his servants. The suggestion is made that, whatever may be the result of the later cases in England, the doctrine of Bush *v.* Steinman has been affirmed in this country. The cases in this court we have already examined. The case of Bailey *v.* Mayor, &c., of New York, 3 Hill, 531, and 2 Denio, 433, was an action brought against the corporation of New York, for the negligent and unskilful construction of the dam for the waterworks at Croton River, by the destruction of which, injury was occasioned to the mills of the plaintiff. The city was held responsible. This case rests well upon the ground that where persons are invested by law with authority to execute a work involving ordinarily the exercise of the right of

gent acts of the servants, since the relation of master and servant is now held not to exist between them; yet the hirer may become so

eminent domain, and always affecting rights of third persons, they are to be liable for the faithful execution of the power, and cannot escape responsibility by delegating to others the power with which they have been intrusted. Blake *v.* Ferris, 1 Seld. 48, seems to conflict with Bailey *v.* Mayor, &c., of New York. Certain persons were permitted to construct a public sewer at their own expense; they employed another person to do it at an agreed price for the whole work; the plaintiffs received an injury from the negligent manner in which the sewer was left at night. It was held, that the persons who were authorized to make the sewer were not responsible for the negligence of the servants of the contractor. This case utterly rejects the rule of Bush *v.* Steinman. The case of Stevens *v.* Armstrong, 2 Seld. 435, was this: A. bought a heavy article of B., and sent a porter to get it; by permission of A., the porter used his tackle and fall; through negligence, the porter suffered the article to drop, by which C. was injured. It was held, that the porter acted as the servant of B., and that A. was not answerable. Yet this was an injury done on A.'s estate, by his permission, and in the use of his property. This case also rejects the rule of Bush *v.* Steinman. In Lesher *v.* Wabash Navigation Co. 14 Ill. 85, where a corporation was authorized to take materials to construct public works, and contracted with others to do the work and find the materials, and the contractors nevertheless took the materials under the authority granted to the corporation, the corporation were held liable therefor. If the court could find that the materials were taken under the authority of the corporation, the case will stand perfectly well under the rule of Lowell *v.* Boston & Lowell Railroad, and Bailey *v.* Mayor, &c., of New York. The cases of Willard *v.* Newbury, 22 Vt. 458, and Batty *v.* Duxbury, 24 Vt. 155, rest on the same principles. In the case of Wiswall *v.* Brinson, 10 Ired. 554, the court held an owner of real estate responsible for the negligence of the servants of a carpenter with whom the defendant had contracted, for a stipulated price, to remove a barn on to his premises. This case (in which, however, there was a divided judgment, Ruffin, C. J., dissenting, in a very able opinion) certainly sustains the doctrine of Bush *v.* Steinman. De Forrest *v.* Wright, 2 Mich. 368, not cited, is in direct conflict with the rule of Bush *v.* Steinman. A public, licensed drayman was employed to haul a quantity of salt from a warehouse, and deliver it at the store of the employer, at so much a barrel. While in the act of delivering it, one of the barrels, through the carelessness of the drayman, rolled against and injured a person on the sidewalk. It was held, that the employer was not liable for the injury, the drayman exercising a distinct and independent employment, and not being under the immediate control and direction or supervision of the employer. This is a well-considered case, rejecting the rule of Bush *v.* Steinman, and sanctioning the result to which we have been brought in the case at bar. We have thus, at the risk of tediousness, examined the case at bar as one of authority and precedent. The clear weight and preponderance of the authorities at common law is against the rule given to the jury. The rule of the civil law seems to have limited the liability to him who stood in relation of *pater familias* to the person doing the injury. Inst. Lib. 4, tit. 5; §§ 1, 2; 1 Domat, 2, tit. 8, sec. 1; Dig. Lib. 9, tit. 2, § 1. Viewing this as a question, not of authority, but to be determined by the application to these facts of settled principles of law, upon what principle can the defendant be held responsible for this injury? He did not

responsible by his own conduct, by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or by ordering his absence at the particular moment when the damage occurs.[1]

§ 456. But, although the principal is thus liable for the torts and negligences of his agent; yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use or benefit.[2] Hence it is, that the principal is never liable for the unauthorized, the wilful, or the malicious act or trespass of his agent.[3] Thus, if a

himself do the act which caused the injury to the plaintiff. It was not done by one acting by his command or request. It was not done by one whom he had the right to command, over whose conduct he had the efficient control, whose operations he might direct, whose negligence he might restrain. It was not an act done for the benefit of the defendant, and from the doing of which an implied obligation for compensation would arise. It was not an act done in the occupation of land by the defendant, or upon land to which, upon the facts, he had any title. To say that a man shall be liable for injuries resulting from acts done near to his land, is to establish a rule as uncertain and indefinite as it is manifestly unjust. It is to make him liable for that which he cannot forbid, prevent, or remove. The case cannot stand on the relation of master and servant. It cannot stand upon the ground of nuisance erected by the owner of land, or by his license, to the injury of another. It cannot stand upon the ground of an act done in the execution of a work under the public authority, as the construction of a railroad or canal, and from the responsibility for the careful and just execution of which public policy will not permit the corporation to escape by delegating their power to others. It can only stand, where Bush *v.* Steinman, when carefully examined, stands, upon the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do, — to adopt which would be to ignore all limitations of legal responsibility." See, farther, Pawlet *v.* Rutland Railroad, 28 Vt. 297. — Ed.]

[1] Per Baron Parke, in delivering the opinion of the court, in Quarman *v.* Burnett, 6 Mees. & Wels. 499, 507. See Laugher *v.* Pointer, 5 B. & Cressw. 547; Story on Bailm. § 403 *a*.

[2] Ante, §§ 319, 454, 455, and note; Paley on Agency, by Lloyd, 305–307; 4 Inst. 317; Mr. Holt's remarks, Ante, § 454, note; Croft *v.* Alison, 4 B. & Ald. 590; Story on Bailm. §§ 400, 402, 403; Bac. Abridg. *Master and Servant*, L.

[3] [Harris *v.* Nicholas, 5 Munford, 483; Brown *v.* Puriance, 2 Harris & Gill, 316; Puryear *v.* Thompson, 5 Humphreys, 397; Kerns *v.* Piper, 4 Watts, 222; Richmond S. Co. *v.* Vanderbilt, 1 Hill, 480; Weed *v.* Panama Railroad, 3 Smith (N. Y.), 367. McGowan *v.* Dyer, L. R. 8 Q. B. 141. It has been therefore held that, though the principal is liable for the actual damage done by his agent to a third party, while acting within the scope of his authority,

servant, while driving the carriage of his master, should wilfully or maliciously run against or upset another carriage, or run down and injure a person in the road, or should jump from his box, and beat a person, — in all these cases, he, and not his master, would be liable for this wanton wrong and mischief.[1] So, the master of a ship is

punitive damages cannot be given against the principal for the malice or wantonness with which the agent acted. Turner *v.* The North Beach, &c., R. R. Co. 34 Cal. 594; Mendelsohn *v.* The Anaheim Lighter Co. 40 Cal. 657; Hagan *v.* Providence & Worcester R. R. Co. 3 R. I. 88. It must be noticed that the test of the liability of the master for the act of the servant is not whether the precise act for which the action is brought was an unauthorized or a wilful act. If the act itself was unauthorized, still if it were done by the servant by inadvertence, by mistake, or by negligence, while the course of action from which it arose was a course of action which was within the scope of his employment, then the master is liable. If the act of the servant was wilful and intentional, still if it was done with the intention of furthering the object of his employment, and was not a manifest departure from the general line of his duty, then, according to the weight of authority, the master will be liable. In either case supposed, it would be no defence to prove that the master had expressly forbidden the act. Limpus *v.* London General Omnibus Co. 1 H. & C. 526; Howe *v.* Newmarch, 12 Allen, 49; Betts *v.* De Vitre, L. R. 3 Ch. App. 441; Whatman *v.* Pearson, L. R. 3 C. P. 422; Philadelphia, &c. R. R. Co. *v.* Derby, 14 How. 468; Garretzen *v.* Duenckel, 50 Mo. 104; Bryant *v.* Rich, 106 Mass. 180; Passenger R.R. Co. *v.* Young, 21 Ohio St. 518; Sherley *v.* Billings, 8 Bush (Ky.), 147; Bayley *v.* Manchester, &c. Railway, L. R. 7 C. P. 415; The Thetis, L. R. 2 Adm. & E. 365; Ramsden *v.* Boston & Albany R. R. Co. 104 Mass. 117; Isaacs *v.* Third Avenue R. R. Co. 47 N. Y. 122; Higgins *v.* Watervliet Turnpike, &c. Co. 46 N. Y. 23; Goddard *v.* Grand Trunk Railw. Co. 57 Me. 202. In the case of carriers of passengers, there is upon the carrier a duty as a carrier, beside the ordinary obligation of a master, to answer for the acts of his servant within the scope of his authority. For the malicious act of his servant, the master is probably never liable as master; for, when the servant acts from personal malice, he acts for himself, and not for his master, and therefore not within the scope of his authority. — G.]

[1] M'Manus *v.* Crickett, 1 East, 106; Smith on Merc. Law, 69, 70 (2d ed.); Id. B. 1, ch. 5, § 3, pp. 127–130 (3d ed. 1843); Croft *v.* Alison, 4 B. & Ald. 590; Bacon's Abridg. *Master and Servant*, L. The judgment of Lord Kenyon, in McManus *v.* Crickett, 1 East, 106, may be considered as the leading judgment on this subject, and states the distinctions with fulness and accuracy. I have, therefore, cited it at large. "This," said his lordship, "is an action of trespass, in which the declaration charges, that the defendant with force and arms drove a certain chariot against a chaise, in which the plaintiff was driving in the king's highway, by which the plaintiff was thrown from his chaise and greatly hurt. At the trial, it appeared in evidence that one Brown, a servant of the defendant, wilfully drove the chariot against the plaintiff's chaise, but that the defendant was not himself present, nor did he in any manner direct or assent to the act of the servant; and the question is, if, for this wilful and designed act of the servant, an action of trespass lies against the defendant, his master? As this is a question of very general extent, and as

not liable for a wilful act of injury done to another ship by his crew, although he would be for such an injury done by their negligence.[1]

cases were cited at the bar, where verdicts had been obtained against masters for the misconduct of their servants under similar circumstances, we were desirous of looking into the authorities on the subject, before we gave our opinion; and after an examination of all that we could find as to this point, we think, that this action cannot be maintained. It is a question of very general concern, and has been often canvassed; but I hope at last it will be at rest. It is said in Bro. Abridg. tit. *Trespass*, pl. 435: 'If my servant, contrary to my will, chase my beasts into the soil of another, I shall not be punished.' And in 2 Roll. Abridg. 553: 'If my servant, without my notice, put my beasts into another's land, my servant is a trespasser, and not I; because, by the voluntary putting of the beasts there, without my assent, he gains a special property for the time, and so to this purpose they are his beasts.' I have looked into the correspondent part in Vin. Abridg., and as he has not produced any case contrary to this, I am satisfied with the authority of it. And in Noy's Maxims, ch. 44: 'If I command my servant to distrain, and he ride on the distress, he shall be punished, not I.' And it is laid down by Holt, C. J., in Middleton *v.* Fowler, Salk. 282, as a general position, 'that no master is chargeable with the acts of his servant, but when he acts in the execution of the authority given him.' Now, when a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to the doctrine of Lord Holt, his master will not be answerable for such act. Such, upon the evidence, was the present case; and the technical reason, in 2 Roll. Abridg. with respect to the sheep, applies here; and it may be said, that the servant, by wilfully driving the chariot against the plaintiff's chaise, without his master's assent, gained a special property for the time, and so to that purpose the chariot was the servant's. This doctrine does not at all militate with the cases, in which a master has been holden liable for the mischief arising from the negligence or unskilfulness of his servant, who had no purpose but the execution of his master's orders. But the form of those actions proves, that this action of trespass cannot be maintained; for, if it can be supported, it must be upon the ground, that, in trespass, all are principals. But the form of those actions shows, that, where the servant is in point of law a trespasser, the master is not chargeable as such, though liable to make a compensation for the damage conse-

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[1] Bowcher *v.* Noidstrom, 1 Taunt. 568. See, as to how far ship-owners are liable in cases of pilots, Lucey *v.* Ingram, 6 Mees. & Wels. 302; The Maria, 1 W. Rob. 95; Martin *v.* Temperley, 4 Q. B. 298; The (Eng.) Jurist, Feb. 25, 1843, No. 320, p. 150; The Agricola, Id. p. 157; Post, § 656 *a*, and note; [White *v.* McDonough, 3 Sawyer, 311. A ship-owner is liable for the tort of a master for the wrongful abduction of a son, where the master is in command of the vessel as the agent of the owner. Tillmore *v.* Moore, 15 Am. L. Rev. 55. A seaman injured without fault of his own is entitled to be taken care of at the vessel's expense until cured, and the mate is not so far the fellow-servant of a sailor as to exempt the master from liability for an injury caused to the sailor by the negligence of the mate. Peterson *v.* The Chandos, 15 Am. L. Rev. 145. See Wilson *v.* Newport Dock Co., L. R. 1 Exch. 177. — Ed.]

§ 456 *a*. From what has been already stated, the master of a ship, and the owner also, is liable for any injury done by the negligence

quential from his employing of an unskilful or negligent servant. The act of the master is the employment of the servant; but from that no immediate prejudice arises to those who may suffer from some subsequent act of the servant. If this were otherwise, the plaintiffs, in the cases mentioned in 1 Ld. Raym. 739 (one, where the servants of a carman, through negligence, ran over a boy in the streets and maimed him; and the other, where the servants of A., with his cart, ran against the cart of B., and overturned it, by which a pipe of wine was spilled), must have been nonsuited from their mistaking the proper form of action, in bringing an action upon the case, instead of an action of trespass; for there is no doubt of the servants in those cases being liable as trespassers; even though they intended no mischief; for which, if it were necessary, Weaver *v.* Ward, in Hobart, 134, and Dickenson *v.* Watson, in Sir Thomas Jones, 205, are authorities. But it must not be inferred from this, that in all cases, where an action is brought against the servant for improperly conducting his master's carriage, by which mischief happens to another, the action must be trespass. Michael *v.* Alestree, in 2 Levinz, 172, where an action on the case was brought against a man and his servant, for breaking a pair of horses in Lincoln's Inn Fields, where, being unmanageable, they ran away with the carriage and hurt the plaintiff's wife, is an instance to show, that trespass on the case may be the proper form of action. And, upon a distinction between those cases, where the mischief immediately proceeds from something in which the defendant is himself active, and where it may arise from the neglect or other misconduct of the party, but not immediately, and which, perhaps, may amount only to a nonfeasance, we held, in Ogle *v.* Barnes, 8 T. R. 188, that the plaintiff was entitled to recover. The case of Savignac & Roome, 6 T. R. 125, which was much pressed, as supporting this action, came before the court on a motion in arrest of judgment; and the only question decided by the court was, that the plaintiff could not have judgment, as it appeared that he had brought an action on the case for that which in law was a trespass; for the declaration there stated, that the defendant, by his servant, wilfully drove his coach against the plaintiff's chaise. Day *v.* Edwards, 5 T. R. 648, was also mentioned, which was an action on the case, in which the declaration charged the defendant personally with furiously and negligently driving his cart; that, by, and through the furious, negligent, and improper conduct of the defendant, the said cart was driven and struck against the plaintiff's carriage; and, on demurrer, the court were of opinion, that the fact complained of was a trespass. And, in the last case that was mentioned, of Brucker *v.* Fromont, 6 T. R. 659, the only point agitated was, whether evidence of the defendant's servant having negligently managed a cart supported the declaration, which imputed that negligence to the defendant; and the court with reluctance held, that it did, on the authority of a precedent in Lord Raymond's Reports, 264, of Tuberville and Stamp. In none of these cases was the point now in question decided; and those determinations do not contradict the opinion we now entertain, which is, that the plaintiff cannot recover, and that a nonsuit must be entered." [Isaacs *v.* Third Ave. R. R. Co., 47 N. Y. 122; Jackson *v.* Second Ave. R. Co., Ibid. 274. And if a man's servant, after finishing his work for the day, instead of putting up his horse and cart, as it was his duty to do, drives a fellow-servant to his home without his master's

of the crew employed in the ship.[1] The same doctrine will apply to the case of a pilot employed by the master or owner, by whose

leave, and in returning runs over a traveller, the master is not responsible. Mitchell v. Crassweller, 13 C. B. 237; Stone v. Hills, 45 Conn. 44; Cormack v. Digby, I. R. 9 C. L. 557. So, where a servant sent on an errand met a friend who allowed him to ride his horse, and an injury happened in consequence. Goodwin v. Kennell. 3 C. & P. 167. See Storey v. Ashton, L. R. 4 Q. B. 476; Sheridan v. Charlick, 4 Daly, 338. So, where B.'s coachman, driving B.'s coach, in order to pass in front of A.'s door, where the latter's goods were being unloaded from a van, got down and led the horses of the van, in consequence of which a case of goods fell out and injured A.'s property, B. was held not to be liable. Lamb v. Palk, 9 C. & P. 629. So, where a servant, without his master's leave, and for a purpose wholly unconnected with his master's business, took out his master's horse and cart, and injured a cab. Rayner v. Mitchell, L. R. 2 Com. Pl. D. 357; Campbell v. City of Providence, 9 R. I. 262. So, where a son took his father's horse and carriage without his knowledge, and for purposes of his own, and left the horse unfastened on the street, and the horse being frightened ran away and injured the plaintiff, the father was held not to be liable. Maddox v. Brown, 15 Am. L. Rev. 61. And where omnibus drivers, contrary to the orders of the owners of the omnibuses, repeatedly surrounded the omnibuses of another line, and thus prevented passengers from entering, their principals were held not to be liable, although in one sense the acts were done for their benefit. Green v. Macnamara, 1 Law Times, N. S. 9; 8 J. Scott, N. S. 880. So, where a person employed by a railway company wrongfully arrests a traveller for the non-payment of his passage-money, but without any instructions from the company so to do, and without any authority in the company to order such arrest, or any ratification by them, the company are not liable. Roe v. The Birkenhead, &c. Railway Co., 7 Eng. Law & Eq. 546; 7 Exch. 36; Eastern Counties R. Co. v. Brown, 2 Eng. Law & Eq. 406. So, where a servant of a company did a similar act under a mistaken view of the law. Poulton v. London, &c. R. Co., L. R. 2 Q. B. 534. But in Goff v. Gt. Northern Railway Co., 30 L. J. Q. B. 148, it was held that if the servant of a railway company caused the arrest of the plaintiff under circumstances which, if his view of the facts had been correct, would have justified the arrest, the company was liable. See Barwick v. Eng. Joint Stock Co., 15 Weekly Reporter, Ex. 877. So, where a servant kindled a fire on his master's land, and by his direction, but afterwards, during his master's absence, and without his orders, carried some fire to another field, to kindle a fire there, and by so doing burnt the plaintiff's grass, the master was held not to be liable. Wilson v. Peverly, 2 N. H. 548. In Armstrong v. Cooley, 5 Gilman, 509 (1849), where the plaintiff's grain and hay were destroyed, by reason of a fire set by a servant of the defendant by his

[1] Ante, §§ 315–317, 453. [The owners of a vessel in flames towed by a tug, and no longer in command of her own captain and crew, are not liable for injury done by her to another vessel, which was caused by the negligence of the captain of the tug, he having gone of his own motion to assist in extinguishing the fire. The Clarita, 23 Wall. 1. The consignee, who has made advances on a shipment of iron, may hold the owner of a vessel liable for a loss of the iron, caused by the act of the master in unloading at an improper wharf. Vose v. Allen, 3 Blatch. C. C. 289. — Ed.]

negligence any injury happens to a third person or his property; as, for example, by a collision with another ship, occasioned by his negligence. And it will make no difference in the case, that the pilot, if any is employed, is required to be a licensed pilot; provided the master is at liberty to take a pilot or not at his pleasure; for, in such a case, the master acts voluntarily, although he is necessarily required to select from a particular class.[1] On the other hand, if it is compulsive upon the master to take a pilot, and, *a fortiori*, if he is bound to do so under a penalty, then, and in such case, neither he

directions, the latter was not permitted to avoid responsibility by showing that he directed the fire to be set only when the wind was in a particular direction. See Simons *v.* Monier, 29 Barb. 419. But where an agent who was authorized to do a certain act upon a certain lot of land goes upon the adjoining land and commits a trespass thereon, without the permission of his principal, the latter was held not to be liable. Bolingbroke *v.* Swindon Local Board, L. R. 9 C. P. 575. See Church *v.* Mansfield, 20 Ct. 284. So, where a servant who was ordered to do an act which was legal, did a totally different act which was illegal. Lynes *v.* Martin, 8 Ad. & El. 512. So, a principal was held not to be liable for a malicious prosecution instituted by his agent, unless with a knowledge of the circumstances he adopted and continued it. Dalley *v.* Young, 3 Ill. App. 39. On the other hand, a master has been held liable where his servant, after setting his master down, drove round to deliver a parcel of his own, and in so doing injured the plaintiff. Heath *v.* Wilson, 2 Moo. & R. 181. So, where servants, in distinct disobedience to orders, went home and left a horse and cart standing in the street. Whatman *v.* Pearson, L. R. 3 C. P. 422. So, where the damage was caused by the negligent driving of the master's cart in the city, though the servant, in obedience to his master's orders, should not have been in the city at all. Joel *v.* Morrison, 6 C. & P. 501. And where an omnibus conductor dragged a drunken passenger out of the omnibus with unnecessary violence and threw him down in the middle of the street, and another vehicle passing at the same moment injured him, without any fault in the driver of the latter vehicle, the proprietor of the omnibus was held to be liable. Seymour *v.* Greenwood, 24 Boston Law Reporter, 123. — Ed.]

[1] The Neptune 2d, 1 Dods. Adm. 467; The Maria, 1 Rob. New Adm. 95; Att'y-Gen'l *v.* Case, 3 Price, 302; Abbott on Shipp. Pt. 2, ch. 7, §§ 8, 9, and cases there cited (5th ed. by Serg. Shee); Id. Addenda, p. 599; Lucey *v.* Ingram, 6 Mees. & Wels. 302. [A licensed pilot, voluntarily employed by the owner of a vessel, is his servant; and if he so navigates the ship as to do damage to the vessel or other property of another, the owner of the vessel which he is navigating must answer for it; and this liability is not altered by the fact that the selection of the pilot is limited to those who have been found by examination to possess the requisite knowledge and skill. Sherlock *v.* Alling, 93 U. S. 99; Yates *v.* Brown, 8 Pick. 23; Bussy *v.* Donaldson, 4 Dall. 206; Shaw *v.* Reed, 9 Watt & S. 72; Martin *v.* Temperley, 4 Q. B. 298; Gen'l Steam Nav. Co. *v.* Brit. & Col. Nav. Co., L. R. 3 Exch. 330. But if the ship is in charge of a licensed pilot, the master will not be liable for damages resulting from a collision not traceable to his own personal negligence, although the employment of the pilot may not have been compulsory. Snell *v.* Rich, 1 Johns. 305. — Ed.]

nor the owner will be liable for injuries occasioned by the negligence of the pilot;[1] for, in such a case, the pilot cannot be deemed properly the servant of the master or the owner, but is forced upon them; and the maxim, "Qui facit per alium, facit per se," does not apply.[2] In short, the rule of the common law seems to be, that wherever a man is absolutely compellable by law to employ a particular individual in a given matter, the law, which compels him to employ that individual, takes away his responsibility arising from any act of that individual.[3] But, if he is only compellable to select from a class of privileged persons, there he will be responsible for the acts of the persons whom he selects and employs. Therefore it has been held, that, where a barge-owner in London employed persons as watermen to navigate on the Thames, none being allowed by law to act as such, except freemen of the city, or apprentices of freemen or of their widows; there, if he selects or employs any watermen, they are to be deemed his servants, and he is responsible for their negligence, although he must select from the class, if he employs any in the business; and, even if he is not at liberty to employ his own servants to navigate the river and carry his own goods, unless they are freemen, or apprentices of freemen or of their widows, belonging to their class.[4] The distinction between this case and the case of the pilot is certainly a very nice one; but it turns apparently upon this ground, that, in the case of the pilot, the master is bound to take one, and, in the other case, the barge-owner is only restricted as to the class of persons whom he shall employ, not being

[1] Abbott on Shipp. Pt. 2, ch. 7, § 8 (6th ed. by Shee, 1840); Att'y-Gen'l v. Case, 3 Price, 302; Carruthers v. Sidebottom, 4 M. & Selw. 77; The Maria, 1 Rob. New Adm. 95; Lucey v. Ingram, 6 Mees. & Wels. 302; The Agricola, The (Eng.) Jurist, Feb. 25, 1843, No. 320, p. 157; Smith v. Condry, 1 How. Sup. Ct. 28; s. c. 17 Pet. 20; The Protector, 1 W. Rob. New Adm. 45; Bennet v. Moira, 7 Taunt. 258; McIntosh v. Slade, 6 B. & Cressw. 657; The Ship Duke of Sussex, 3 W. Rob. New Adm. 270, 272. [Where the law obliges the master of a vessel in entering or departing from a port to take the first licensed pilot who tenders his services, and to put him in control of the ship, the pilot does not become the servant of either the master or owner of the vessel, and they are neither of them responsible for the consequences of his negligence. The Annapolis, 1 Lush. 295; The Temora, Ibid. 17; The Earl of Auckland, Ibid. 164. But, in The China, 7 Wallace, 53, it was held that the law obliging the master to take a pilot does not exonerate the vessel from liability. — Ed.]

[2] Ibid.

[3] Ibid.

[4] Martin v. Temperley, 4 Q. B. 298; The (Eng.) Jurist, Feb. 25, 1842, No. 320, p. 150. But see The Agricola, Ibid. pp. 157, 158; Milligan v. Wedge, 12 Adolph. & Ellis, 737.

compellable to employ any. Unless the distinction were allowed to prevail, the owner or master of a British ship would not be responsible for the negligence of the crew, since they are compellable to select the crew from a particular class; that is, three-fourths at least of the crew must be British seamen.[1]

[1] Ibid. It is observable that the cases above cited generally turn upon the distinction, whether the master or employer is absolutely compellable or not to take a pilot, or to employ a particular person (not merely one of a class, from which he may select) or not. The British Pilot Acts generally, but not universally, make it compulsive, under a penalty, upon the master of a ship to take a pilot, and in such cases exempt the master and owner from responsibility for the negligence of the pilot. But, in some cases, the master has an option to employ a pilot or not; and, in case he elects not to employ one, he is by law required to pay the pilotage fee, or a part thereof, to any pilot who offers himself, and whose services are declined. In these latter cases, the question has arisen, whether the master and owners are responsible for the negligence of the pilot, if one is taken by the election of the master. The present learned Judge of the high Court of Admiralty (Dr. Lushington) has held, that there is no difference in principle, whether the master or owner is compellable, under a penalty, to take a pilot, and whether he has an election to take or not, but if he declines to take one, then he is to pay pilotage; and he deems the pilotage, so paid, as in the nature of a penalty. But there seems great reason to doubt the correctness of this doctrine. In the first place, the penalty is properly and strictly designed, as a punishment for an offence, in neglecting or refusing to comply with a positive duty imposed by law; and the penalty is in no just sense to be treated as a commutation for liberty to commit the offence, and to omit the duty. In the other case no such positive duty exists, and it is left to the choice of the master to take a pilot or not, according to his own discretion. The taking of the pilot is, then, a voluntary act, and not a compulsive act. In the next place, the compensation to be paid to the pilot, or the pilotage allowed him, in case of the master's declining to employ him, is not a penalty, or in the nature of a penalty, to compel the party to take a pilot, but is more properly to be treated as a remuneration of the pilot for keeping himself at all times ready to perform the duty of a pilot, when required, and to encourage him to encounter the hazards and perils incident to such a service, and to secure adequate skill and ability for the safety and protection of vessels navigating the coasts and harbors of the country. It is, therefore, a compensation, *pro opera et labore*, founded in a sound public policy, to secure protection, and prompt assistance, and ready skill, to all persons who may require them in navigation, rather than a punishment for a dereliction of duty. See The Ship Duke of Sussex, 3 W. Rob. New Adm. 270, 272. In America, certainly, no such doctrine has ever been inculcated; and the owners and masters of ships are held liable for the negligence of pilots, in cases where they are not compellable to take them; although, if not taken, half pilotage, or some other proportion of pilotage, is required to be paid to the pilot who offers. Williamson *v.* Price, 16 Martin, 399; Yates *v.* Brown, 8 Pick. 23. See also the opinion of Sir John Nicholl in The Girolamo, 3 Hagg. Adm. 169, 172. Indeed, in the case of Williamson *v.* Price, 16 Martin, 399, the Supreme Court of Louisiana went much further, and seems to have held, that, even if the taking of a pilot

§ 457. We have already had occasion, also, to notice another exception, or, more properly speaking, another limitation of the doctrine of the responsibility of principals for the malfeasances, and negligences, and torts, of their agents and servants, in the course of their employments, and that is in the case of public agents.[1] The latter are responsible for their own personal malfeasances and negligences only, and not for the malfeasances and negligences of the persons who are employed under them, if they are persons of reasonable skill and discretion, and the agents themselves have not directed or co-operated in the wrong.[2] This doctrine is founded partly upon considerations of public policy, and partly results from the fact, that these subordinates are often appointed by another independent authority, and are not controllable by, or immediately responsible to, the public agents.[3]

§ 458. The Roman law, in like manner, in many cases, made the principal liable for the torts and negligences of his agents and servants.[4] It has been supposed, that the Roman law never was as extensive in its reach as our law; in other words, that it never did create a general liability of principals for the wrongs and negligences of their agents, but limited it to particular classes of cases; and that the liability of principals, so far as it is recognized in that law, is mainly dependent upon the prætor's edict, and was not worked out of the original materials of the Roman jurisprudence. Whether

on board was a compulsive duty, and not optional, still the owners were liable for the negligence of the pilot actually employed. See also Bussy *v.* Donaldson, 4 Dall. 206, which seems to have adopted the same doctrine. And this seems also to have been the opinion entertained by Lord Stowell, upon general principles; The Neptune 2d, 1 Dodson, Adm. 467; and by Sir John Nicholl in The Girolamo, 3 Hagg. 169. But see the able note of Mr. Curtis, on this subject, in his work on Merchant Seamen, pp. 195, 196, note. Even under the British Pilot Acts, in order to exempt the owner from responsibility, the collision, or other act, occasioning the damage, should be exclusively caused by the negligence, unskilfulness, or misconduct of the pilot alone; for, if it be in part caused by the unskilfulness, misconduct, or negligence of the master or mariners, the owner will still remain liable therefor. The Protector, 1 Rob. Adm. 45; The Diana, 1 W. Rob. New Adm. 131; Smith *v.* Cowdry, 17 Peters, 20; s. c. 1 Howard's Sup. Ct. 28.

[1] Ante, §§ 320–322. [See Erwin *v.* Davenport, 9 Heisk. 44; Murphy *v.* Lowell, 124 Mass. 564; Sceery *v.* Springfield, 112 Mass. 512; Wamesit Power Co. *v.* Allen, 120 Mass. 352.]

[2] Ante, §§ 320–322, 455. See Lord Abinger's remarks in Winterbottom *v.* Wright, 10 Mees. & Wels. 109, 114, 115.

[3] Ante, §§ 321, 322, and notes.

[4] Ante, § 318.

this supposition be correct or not, it is clear, that, in certain classes of cases, the prætor, by his edict, either introduced a new and more rigid liability, or he gave to that which previously existed an additional force, and, in some respects, a more onerous obligation. Thus, masters and employers of ships, innkeepers, and stable-keepers, were made responsible for the safety and due delivery of the goods committed to their charge; and, of course, if the loss or damage were occasioned by the negligences or wrongs of their servants, and not by themselves, their responsibility was not varied.[1] "Ait prætor;

[1] Ante, § 318; Story on Bailm. §§ 464, 565; Dig. Lib. 4, tit. 9, l. 1, § 3; Heinecc. Pand. Lib. 4, tit. 8, §§ 546–548; Pothier, Pand. Lib. 4, tit. 9, n. 1, 2, 8; 1 Domat, B. 1, tit. 16, § 1, art. 3, 5; Id. § 2, art. 2; Id. § 3, art. 1. Lord Stair, in his Institutes (B. 1, tit. 13, § 3), seems manifestly to have considered this edict, as introducing, for the first time, the liability of principals for the acts and defaults of their agents, and of making that liability more rigid, in many cases, upon the ground of public policy. His language is: "In the civil law there is a depositation of a special nature, introduced by the edict; nautæ, caupones, stabularii, 'quod cujusque salvum fore receperint, nisi restituent, in eos judicium dabo.' By this edict, positive law, for utility's sake, hath appointed, that the custody of the goods of passengers in ships, or strangers in inns, or in stables, shall be far extended beyond the nature of depositation, which obliges only for fraud, or supine negligence, them who have expressly contracted for their own fact. But this edict, for public utility's sake, extends it; first, to the restitution of the goods of passengers and voyagers, and reparation of any loss or injury done by the mariners, or servants of the inn or stable. Whereas, by the common law, before that edict, in this and such other cases, there was no such obligement; much less are persons now obliged for their hired servant's fact or fault, except facts wherein they are specially intrusted by them. But, because the theft and loss of goods is very ordinarily in ships, inns, and stables, therefore this edict was introduced for the security of travellers. Secondly, the edict extends this obligement, even to the damage sustained by (the act of) other passengers or strangers in the ship, inn, or stable, for the which, the master of the ship, innkeeper, or keeper of the stable, could be no ways obliged but by virtue of this edict. Thirdly, they were made liable for the loss or theft of such things absolutely from which they were free by no diligence, but were not liable for accident or force; that is, sea-hazard must always be excepted." See also 1 Bell, Comm. §§ 398–402, 500, 505 (4th ed.); Id. pp. 463–476 (5th ed.). See Story on Bailm. §§ 400–402, 458, 464–466. There are certainly passages in the Digest, which make principals responsible for the faults and negligences of their agents and servants, beyond those specially pointed out in the prætor's edict. This responsibility seems, however, to have been limited to cases where the principal was guilty of some negligence in employing negligent and improper agents and servants. Thus, in the Digest, the opinion of Pomponius is approved: "Videamus, an et servorum culpam, et quoscunque induxerit, præstare conductor debeat? Et quatenus præstat? Utrum, ut servos noxæ dedat, an vera suo nomine teneatur? Et adversus eos quos induxerit, utrum præstabit tantum actiones, an quasi ob propriam culpam tenebitur? Mihi ita placet, ut culpam etiam eorum, quos induxit, præstet suo nomine, etsi nihil

nautæ, caupones, stabularii, quod cujusque salvum fore receperint, nisi restituent, in eos judicium dabo."[1] The reason assigned is, that the rule is well founded in public policy and convenience, and is the only means to prevent losses by fraud or connivance.[2] *A fortiori*, if the act was done with the consent of the principal, he was liable. "Quamquam, si ipse alicui e nautis committi jussit, sine dubio debeat obligari."[3] The liability of the principal for the acts and negligences of the agents, as well as for his own, is fully proclaimed in the comments of the Roman law. Thus, for example, it is said, as to the owners or employers of ships: "Et sunt quidam in navibus, qui custodiæ gratiâ navibus præponuntur, ut *ναυφύλακες*, id est, navium custodes et dietarii. Si quis igitur ex his receperit, puto in exercitorem dandam actionem; quia is, qui eos hujusmodi officio præponit, committi eis permittit."[4] The same doctrine is also applied to innkeepers. "Caupo præstat factum eorum, qui in eâ cauponâ, ejus cauponæ exercendæ causâ, ibi sunt. Item earum, qui habitandi causâ ibi sunt. Viatorum autem factum non præstat."[5] The same doctrine is also applied to stable-keepers. "Caupones autem et stabularios æque eos accipiemus, qui cauponam vel stabulum exercent, institoresve eorum.[6] Eodem modo tenentur caupones et stabularii quo exercentes negotium suum recipiunt. Cæterum, si extra negotium receperint, non tenebuntur."[7]

convenit, *si tamen culpam* in inducendis admittit, quod tales habuerit, vel suos, vel hospites." Digest, Lib. 19, tit. 2, l. 11; Pothier, Pand. Lib. 19, tit. 2, n. 30, 31. See also Dig. Lib. 9, tit. 2, l. 29, §§ 9, 11; Pothier, Pand. Lib. 19, tit. 2, n. 31. See Story on Bailm. § 401; 1 Domat, B. 1, tit. 4, § 2, art. 5, 6; Id. B. 2, tit. 8, § 1, art. 1-9; Id. § 4, art. 8. Again: Qui "columnam transportandam conduxit, si ea dum tollitur, aut portatur, aut reponitur, fracta sit, ita id periculum præstat, si qua ipsius, eorumque, quorum operâ uteretur, culpa acciderit. Culpa autem abest, si omnia facta sunt quæ diligentissimus quisque observaturus fuisset." Dig. Lib. 19, tit. 2, l. 25, § 7; Pothier, Pand. Lib. 19, tit. 2, n. 32.

[1] Dig. Lib. 4, tit. 9, l. 1. Pothier, Pand. Lib. 4, tit. 9, n. 1, 2; 1 Domat, B. 1, tit. 16, § 1, art. 2, 4, 6; Id. § 2. art. 2; Id. § 3, art. 1-3; Heinecc. ad Pand. Lib. 4, tit. 8, §§ 546-548, 551; Ante, § 318.

[2] Ante, § 317, note 2; 1 Domat, B. 1, tit. 16, § 1, art. 7.

[3] Dig. Lib. 4, tit. 9, l. 1, § 2; Pothier, Pand. Lib. 4, tit. 9, n. 2; Ante, § 317, note 2; 1 Domat, B. 1, tit. 16, § 1, art. 5.

[4] Dig. Lib. 4, tit. 9, l. 1, § 3; Pothier, Pand. Lib. 4, tit. 9, n. 2; 1 Domat, B. 1, tit. 16, § 2, art. 1-4.

[5] Dig. Lib. 47, tit. 5, l. 1, § 6; Pothier, Pand. Lib. 47, tit. 5, n. 3; 1 Domat, B. 1, tit. 16, § 1, art. 3, 6.

[6] Dig. Lib. 4, tit. 9, l. 1, § 5; Pothier, Pand. Lib. 4, tit. 9 n. 2; 1 Domat, B. 1, tit. 16, § 1, art. 3.

[7] Dig. Lib. 4, tit. 9, l. 3, § 2; Pothier, Pand. Lib. 4, tit. 9, n. 3; Post, § 459.

And the whole doctrine is summed up in another passage, where it treats of the liability of such principals for the frauds, deceits, and thefts of their agents or servants, without their knowledge. "Item exercitor navis, aut cauponæ, aut stabuli, de dolo aut furto, quod in navi, aut cauponâ, aut stabulo, factum erit quasi ex maleficio teneri videtur, si modo ipsius nullum est maleficium, sed alicujus eorum, quorum operâ navem aut cauponam aut stabulum exercet. Cum enim neque ex maleficio, neque ex contractu, sit adversus eum constituta hæc actio, et aliquatenus culpæ reus est, quod operâ malorum hominum uteretur; ideo, quasi ex maleficio, teneri videtur."[1] Here we have the rule of the liability of owners and employers of ships and stable-keepers, and the reason for it. They are responsible for the tort and fraud of their agents and servants, although they are not parties to it, *quasi ex maleficio*, as if they themselves were wrong-doers, because they have made use of the services of such bad agents and servants, in their employment.

§ 459. And here, again, the like limitations to this liability were recognized in the Roman law, as exist in ours. The principal was not liable for the torts or negligences of his agents or servants, except in cases within the scope of their employment. Thus, for example, the innkeeper was liable only for the torts or thefts, or damages of his servants, done or committed in his inn, or about the business thereof; and not for such torts or thefts committed in other places. "Eodem modo tenentur caupones et stabularii, quo exercentes negotium suum recipiunt. Cæterum, si extra negotium receperint, non tenebuntur."[2] So, the owner or employer of a ship

[1] Inst. Lib. 4, tit. 5, § 3; 1 Domat, B. 1, tit. 16, § 1, art. 7; Id. § 2, art. 1–4. The same rule is laid down in the Digest. "In eos, qui naves, cauponas, stabula exercebunt, si quid a quoquo eorum, quosve ibi habebunt, furtum factum esse dicetur, judicium datur; sive furtum ope, consilio exercitoris factum sit; sive eorum cujus, qui in eâ navi navigandi causâ esset. Navigandi autem causâ accipere debemus eos, qui adhibentur, ut navis naviget, hoc est, nautas." Dig. Lib. 47, tit. 5, Introd. and l. 1; Pothier in Pand. Lib. 47, tit. 5, n. 1, 3. "Quæcunque de furto diximus, eadem et de damno debent intelligi. Non enim dubitari oportet, quin is, qui salvum fore recipit, non solum a furto, sed etiam a damno recipere videatur." Dig. Lib. 4, tit. 9, l. 5, § 1; Pothier, Pand. Lib. 4, tit. 9, n. 8; Dig. Lib. 14, tit 1, l. 1, § 2; Pothier, Pand. Lib. 14, tit. 1, n. 6; Heinecc. Pand. Ps. 1, Lib. 4, tit. 8, §§ 551–554; Story on Bailm. §§ 464–468; Ersk. Inst. B. 3, tit. 1, §§ 28, 29; Id. B. 3, tit. 3, §§ 43–45; 1 Bell, Comm. §§ 398–406 (4th ed.); Id. pp. 465–476 (5th ed.); 1 Domat, B. 1, tit. 16, Introd.; Story on Bailm. § 401.

[2] Dig. Lib. 4, tit. 9, l. 3, § 2; Pothier, Pand. Lib. 4, tit. 9, n. 3; Ante, § 458.

was not liable for the torts or thefts, or damages of the mariner, unless they were done or committed in the ship, or about the business thereof. "Debet exercitor omnium nautarum suorum, sive liberi, sive servi, factum præstare. Nec immerito factum eorum præstat, cum ipse eos suo periculo adhibuerit. Sed non alias præstat, quam si in ipsâ nave damnum datum sit. Cæterum, si extra navem, licet a nautis, non præstabit."[1]

§ 460. Similar principles were applied in the Roman law to the ordinary agents employed in the common business of trade and commerce, called Institores;[2] and also to the cases of domestic servants and persons belonging to the family. "Prætor ait de his, qui dejecerint, vel effuderint; Unde in eum locum, quo vulgo iter fiet, vel in quo consistetur, dejectum vel effusum quid erit, quantum ex eâ re damnum datum factumve erit, in eum, qui ibi habitaverit, in duplum judicium dabo.[3] Si servus, insciente domino, fecisse dicetur, in judicio adjiciam, aut noxam dedere."[4] These seem to be the most important cases, specially and positively provided for in the Roman law. That law does not seem to have recognized, to the full extent, the general maxim, *Respondeat superior*, inculcated by our law.[5]

[1] Dig. Lib. 4, tit. 9, l. 7; Pothier, Pand. Lib. 47, tit. 5, n. 1; 1 Domat, B. 1, tit. 16, § 1, art. 7; Id. § 2, art. 1–4.

[2] Ante, § 8; 1 Domat, B. 1, tit. 16, § 3, art. 1; Dig. Lib. 14, tit. 3, l. 5, §§ 1–9; Pothier on Oblig. n. 121, 453, by Evans; Id. in French ed. n. 121, 489.

[3] Dig. Lib. 9, tit. 3, l. 1; Id. l. 27, § 11; 1 Bl. Comm. 431; Inst. Lib. 4, tit. 5, § 1; Ersk. Inst. B. 3, tit. 3, § 46; Dig. Lib. 19, tit. 2, l. 11; 1 Domat, B. 2, tit. 8, § 1, art. 1–9.

[4] Dig. Lib. 9, tit. 3, l. 1; Pothier, Pand. Lib. 9, tit. 3, n. 1; Inst. Lib. 4, tit. 5, §§ 1, 2.

[5] See 1 Stair's Inst. B. 1, tit. 13, § 3; Ante, § 454, note. Mr. Holt, in the note already cited in § 454, note 1, says, that, "In the civil law the liability was narrowed to the persons standing in the relation of a *pater familias* to the wrong-doer." It is also observable, that Mr. Le Blanc and Mr. Marshall, in arguing the case of Bush *v.* Steinman, 1 Bos. & Pull. 405, assert, that "The liability of the principal to answer for his agents is founded in the superintendence and control which he is supposed to have over them (citing 1 Bl. Comm. 431). In the civil law, that liability was confined to the person standing in the relation of *pater familias* to the person doing the injury." For which they cite Inst. Lib. 4, tit. 5, § 1, and Dig. Lib. 9, tit. 3. These citations clearly prove, that the *pater familias* is liable for the wrongful acts and negligences of his domestics; but they do not prove, negatively, that other persons were not liable, as principals, in any other cases, for the wrongs and faults of their agents. The text shows, that, in many other cases, besides that of a *pater familias*, the principal was, in the civil law, liable for such wrongs and faults. The learned counsel seem to have misunderstood the true meaning of

§ 461. The modern nations of continental Europe have adopted the doctrine of the Roman law to its full extent, and some of them at least seem to have carried it further. Pothier lays down the rule in the following broad terms: "Not only is the person who has committed the injury, or been guilty of the negligence, obliged to repair the damage which it has occasioned; those who have any person under their authority, such as fathers, mothers, tutors, preceptors, are subject to this obligation in respect of the acts of those who are under them, when committed in their presence, and generally when they could prevent such acts, and have not done so. But, if they could not prevent it, then they are not liable: 'Nullum crimen patitur is, qui non prohibet, quum prohibere non potest.'[1] Even when the act is committed in their sight, and with their knowledge: 'Culpa caret, qui scit, sed prohibere non potest.'[2] Masters are also answerable for the injury occasioned by the wrongs and negligence of their servants. They are even so, when they have no power to prevent them, provided such wrongs or injuries are committed in the exercise of the functions, in which the servants are employed by their masters, although in the master's absence. This has been established, to render masters careful in the choice of those whom they employ. With regard to their wrongs or neglects, not committed in these functions, the masters are not responsible."[3] The doctrine of the Roman law seems to be followed with more scrupulous exactness in the laws of Spain[4] and of Scotland,[5] where, in treating of the liability of principals for the acts of their agents, the specific enumerations of the Roman law are to be found followed out.

the text of Blackstone's Commentaries, which by no means insists upon any such limitations. Mr. Justice Heath, in the same case, seems to have entertained the notion, that the Roman law was, or might be, as limited as the learned counsel supposed. But he added: "Whatever may be the doctrine of the civil law, it is perfectly clear that our law carries such liability much further." s. c. 1 Bos. & Pull. 409. See also Story on Bailm. §§ 464–469.

[1] Dig. Lib. 50, tit. 17, l. 109.

[2] Dig. Lib. 50, tit. 17, l. 50.

[3] Pothier on Oblig. by Evans, n. 121, 453 (in the French ed. n. 121, 489).

[4] 2 Moreau & Carlt. Partidas, 5, tit. 8, l. 26, p. 743; Story on Bailm. §§ 465–468.

[5] Ersk. Inst. B. 3, tit. 3, §§ 43–46; 2 Bell, Comm. §§ 398–406 (4th ed.); Id. pp. 465–476 (5th ed.); 1 Stair, Inst. B. 1, tit. 13, § 3.

CHAPTER XVIII.

DISSOLUTION, OR DETERMINATION, OF AGENCY.

§ 462. We come, in the next place, to the consideration of the manner in which an agency may be dissolved or determined, and the effect thereof. And a dissolution of the agency may take place in two different ways: first, by the act of the principal or agent; and, secondly, by operation of law. The former takes place, wherever there is a revocation by the principal, or a renunciation by the agent. The latter may take place in various ways: first, by the termination of the agency, by the mere efflux of time, or by the expiration of the period, or by the occurrence of the event to which and by which it was originally limited; secondly, by the change of the state or condition of the principal or of the agent; thirdly, by the death of either party; and, fourthly, by the natural cessation of the power, in consequence of the extinction of the subject-matter, or of the principal's power over it, or by the complete execution of the power.[1]

§ 463. First. Let us consider the dissolution of an agency by the revocation of the principal. In general, the principal has a right to determine or revoke the authority given to his agent at his own mere pleasure; for, since the authority is conferred by his mere will, and is to be executed for his own benefit and his own purposes, the agent cannot insist upon acting, when the principal has with-

[1] See Pothier, de Mandat, n. 100; 2 Kent, Comm. Lect. 41, p. 643 (4th ed.). Pothier, in his edition of the Pandects (Lib. 17, tit. 1, *tertia pars*, Introd. to n. 75). "Potissimæ causæ, ex quibus mandatum solvitur, hæ sunt; mors mandatarii; mors mandatoris; si mandator revocaverit mandatum; si mandatarius mandato renuntiaverit." Mr. Thomson, in speaking of the law of Scotland, says: "Mandates terminate, in general, by the death of the mandant or mandatary; by the insanity of the latter; by revocation; by renunciation; or by the sequestration of the mandant, which vests his estate, and all the rights connected with it, in his creditors. The mandatary's bankruptcy does not appear to be inconsistent with the continuance of his mandate." Thomson on Bills of Exchange, pp. 224, 225 (2d ed. 1836).

drawn his confidence, and no longer desires his aid.[1] This is so plain a doctrine of common sense and common justice, that it requires no illustration or reasoning to support it. At what time the revocation will take effect, and the modes by which it is accomplished, will presently come under our consideration.[2]

§ 464. The civil law contained an equally broad doctrine. "Si mandavero exigendam pecuniam, deinde voluntatem mutavero, an sit mandati actio vel mihi, vel hæredi meo? Et ait Marcellus: Cessare mandati actionem, quia extinctum est mandatum, finitâ voluntate."[3] The same principle has infused itself into the jurisprudence of modern Europe; as indeed it could not fail to do, since it is but an application of a maxim founded upon the natural rights of men in all ages in regard to their own private concerns, when the law has not interfered to prohibit the exercise of them.[4]

§ 465. Such is the general rule; and it strictly applies in all cases where the authority has not been actually exercised at all by the agent. For, in such a case, the principal may exercise his power of revocation at any moment. So, if it has been in part put in the course of execution, but not to such an extent as to become obligatory between the parties; as, if preliminary proceedings only have been instituted.[5] Thus, for example, if a broker should enter into a verbal agreement to sell goods for his principal, and the sale is within the reach of the statute of frauds (which requires the agreement to be in writing), and, before the broker signs the written agreement of sale, the principal should revoke his authority, the revocation will have full validity.[6] So, if the sale respects lands, and is within the statute of frauds, the same rule will, under the like circumstances, apply. So, if an insurance broker should negotiate a policy of insurance for his principal, and, before it is completed, the principal should dissent, and repudiate the transaction, the revo-

[1] Story on Bailm. §§ 202, 207–209. [And even if he is appointed under seal, it has been held that his authority may be revoked by parol. Brookshire *v.* Brookshire, 3 Iredell, 74. See United States *v.* Jarvis, Daveis, 287; Henderson *v.* Hydraulic Works, 9 Phil. 100. — Ed.]

[2] Post, §§ 470–475.

[3] Dig. Lib. 17, tit. 1, l. 12, § 16; Pothier, Pand. Lib. 17, tit. 1, n. 79; 1 Domat, B. 1, tit. 15, § 4, art. 1; Heinecc. Elem. Pand. Lib. 17, tit. 1, § 238; Inst. Lib. 3, tit. 27, § 9.

[4] Pothier on Oblig. by Evans, n. 474 (in French ed. n. 510); 1 Bell, Comm. § 413 (4th ed.); Id. pp. 488–490 (5th ed.); Ersk. Inst. B. 3, tit. 3, § 49; 1 Stair, Inst. B. 1, tit. 12, § 8.

[5] Post, §§ 466, 467.

[6] Farmer *v.* Robinson, 2 Camp. 339, n.

cation will be complete and operative.[1] Upon a similar ground, if a broker should deliver money or goods to a bailee, to be delivered to a third person, he may countermand the order at any time before the delivery thereof to the third person, or his assent thereto.[2] But after the third person has assented thereto, the bailment is not countermandable, if there is a valuable consideration for the bailment.[3]

§ 466. But let us suppose that the authority has been in part actually executed by the agent; in that case the question will arise, whether the principal can revoke the authority, either in the whole or as to the part which remains unexecuted. The true principle would seem to be, that if the authority admits of severance, or of being revoked, as to the part which is unexecuted, either as to the agent or as to third persons, then, and in such case, the revocation will be good as to the part unexecuted, but not as to the part already executed. But if the authority be not thus severable, and damage will thereby happen to the agent on account of the execution of the authority *pro tanto*, there the principal will not be allowed to revoke the unexecuted part, or, at least, not without fully indemnifying the agent.[4] As to the rights of the other contracting party in this last

[1] Warwick *v.* Slade, 3 Camp. 127; Bristow *v.* Porter, 2 Stark. 50. [And where an agent was employed to sell goods to be delivered within thirty days, and he completed the sale, but no memorandum in writing was made by him, and the goods were not delivered by the owner, he cannot, after having been paid by his employer for his services, and his agency thereby terminated, sign such a memorandum of sale for the purchaser as will bind his employer. Reid *v.* Latham, 40 Conn. 452. So, where a broker was employed to find a purchaser of land within a month, and upon doing so was to be paid by the owner a certain compensation, and his employer revoked the agency before the end of the month, but the broker found a purchaser within the time specified; it was held that he was not entitled to a commission. Brown *v.* Pforr, 38 Cal. 550. — Ed.]

[2] Story on Bailm. §§ 207–210; 3 Chitty on Com. & Manuf. 223, 224. [So, where a party has, without consideration, entrusted to an agent a sum of money to settle a lawsuit between two other parties, he can revoke the agency at any time before settlement is completed. Phillips *v.* Howell, 60 Ga. 411; Scotthorn *v.* So. Staffordshire Railway, 8 Exch. 341; Lewis *v.* Sawyer, 44 Me. 332. But where a debtor delivers money to a party to be paid to his creditor, such party becomes the agent of the debtor, who may revoke his orders at any time before the creditor assents, and such assent may be presumed by the latter's knowledge of the transaction. Simonton *v.* Minneapolis Bank, 24 Minn. 216. — Ed.]

[3] Hodgson *v.* Anderson, 3 B. & Cressw. 842; 2 Story on Eq. Jurisp. §§ 1041–1047; Post, § 477; [Creager *v.* Link, 7 Md. 267].

[4] 1 Bell, Comm. § 413 (4th ed.); Id. p. 489 (5th ed.); Post, §§ 483, note, 494; [United States *v.* Jarvis, Davies, 274].

case, they are not affected by the revocation; but he will retain them all, as well as all the remedies consequent upon any violation of them, in the same manner as if no revocation has taken place.[1]

§ 467. Perhaps there is no direct authority in our law for the support of this proposition.[2] But it stands so clearly approved by natural justice, as well as by the principles of the Roman law and the jurisprudence of modern commercial nations, that it is difficult to resist it. Thus, it is laid down in the Roman law, as a principle of broad and general justice: "Nemo potest mutare consilium suum in alterius injuriam."[3] And the very case is put of a purchase authorized and afterwards revoked. "Si mandâssem tibi, ut fundum emeres, postea scripsissem, ne emeres; tu antequam scias me vetuisse, emisses; mandati tibi obligatus ero, ne damno adficiatur is, qui suscipit mandatum."[4] The reason here assigned for making the sale obligatory has great force; for damage might otherwise happen to the agent. Pothier says, that if the agent, when he receives knowledge of the revocation of his authority, has already commenced executing the business, he is nevertheless authorized to do whatever may be a necessary duty or consequence of that which he has commenced ("faire ce, qui est une suite nécessaire de ce qu'il avoit commencé"), and the principal will be bound thereby.[5]

§ 468. Domat lays down the doctrine in the following terms: "The power and charge of a proxy, or other agent, expire by the change of the will of the person who made choice of him. For this choice is free, and he may revoke his order whenever he thinks fit; provided he makes known his revocation to the person whom he revokes, and that all things be still entire. But if the proxy or other agent had already executed the order, or begun to execute it, before he knew any thing of the revocation, it would be without effect, as to what had been already executed; and he will be indemnified as to any obligation into which the said order may have engaged him."[6] So, Erskine lays it down as the law of Scotland,

[1] See 3 Chitty on Com. & Manuf. 223, 224; 2 Story on Eq. Jurisp. §§ 1041–1047; Hodgson *v.* Anderson, 3 B. & Cressw. 842; 1 Domat, B. 1, tit. 16, § 3, art. 9.

[2] 3 Chitty on Com. & Manuf. 223, 224; 2 Kent, Comm. Lect. 41, p. 643 (4th ed.); Story on Bailm. §§ 208, 209; 1 Bell, Comm. § 413 (4th ed.); Id. p. 489 (5th ed.). [But see United States *v.* Jarvis, Davies, 274.]

[3] Dig. Lib. 50, tit. 17, l. 75.

[4] Dig. Lib. 17, tit. 1, l. 15; Pothier, Pand. Lib. 17, tit. 1, n. 89.

[5] Pothier, de Mandat, n. 121.

[6] 1 Domat, B. 1, tit. 15, § 4, art. 1, by Strahan.

that to justify a revocation, matters must remain entire. "For," says he, "if the mandatary has executed a part of his commission, and thereby becomes concerned that it should not be revoked; if, for instance, he should, on the faith thereof, have obliged himself to purchase goods from a third party, the mandant cannot effectually revoke his commission till he relieve the mandatary from such engagements." [1]

§ 469. It follows from what has been said, that, when the power of an agent is revoked or terminated, that also of any substitute appointed by and under him, it being a dependent power, is ordinarily also revoked. This is a natural result from the presumed intention of the principal, who, in withdrawing or terminating the authority of his agent, withdraws, by implication, the derivative authority of his substitute, whether it is expressly provided for in the original delegation or not.[2] It is also a result of law; for, as the agent could not after the revocation do the act personally, neither could the substitute acting in his stead, since the source of the authority has ceased to exist. And, accordingly, Pothier assigns this as the reason of the rule.[3] Exceptions may exist; as where, from the express terms, or from the nature of the power, it is a just inference that the principal intends that the substitute shall continue to act for him, notwithstanding the revocation of the authority of his immediate agent.[4] In many cases of the appointment of public officers, it is expressly provided that their deputies shall continue to act, notwithstanding the removal or death or incapacity of the superior officer who appointed them. The same presumption may arise in some cases of a private agency. Thus, for example, the removal or death or incapacity of the master of a ship, who has appointed the mate, will not be understood to revoke the appointment of the latter; for it is ordinarily the duty of the mate to act as master, whenever the place of the master is vacant from any cause whatsoever, and no other substitute is provided by the owner.

§ 470. In the next place, let us consider at what time and under what circumstances the revocation, by the act of the principal, takes effect. And here the rule of our law is equally clear and comprehensive, and just. As to the agent himself, subject to what has been

[1] Ersk. Inst. B. 3, tit. 3, § 40; 1 Bell, Comm. § 413 (4th ed.); Id. pp. 488, 490 (5th ed.).

[2] Pothier, de Mandat, n. 112; Post, § 496.

[3] Pothier, de Mandat, n. 112.

[4] Post, § 490.

already stated, it takes effect from the time when the revocation is made known to him; and as to third persons when it is made known to them, and not before.[1] Until therefore the revocation is so made known, it is inoperative. If known to the agent, as against his principal, his rights are gone; but, as to third persons who are ignorant of the revocation, his acts bind both himself and his principal.[2] Hence it is that, if a clerk or agent is employed to sign, indorse, or accept bills and notes for his principal, and he is discharged by the principal, if the discharge is not known by persons dealing with him, notes and bills subsequently signed, indorsed, or accepted by the clerk or agent, will be binding upon the principal.[3] Indeed, this is but another application of the known maxims of law and equity, that, where one of two innocent persons must suffer, he shall suffer who, by his confidence or silence or conduct, has misled the other.[4]

[1] [If notice of the revocation of the agent's authority has not been communicated to a party, his payment to the agent of a debt due to the principal will release him from liability to the latter. Packer *v.* Hinckley Locomotive Works, 122 Mass. 484; Insurance Co. *v.* McCain, 96 U. S. 84; Rice *v.* Barnard, 127 Mass. 241; Braswell *v.* Am. Life Ins. Co., 75 No. Car. 8; Ulrich *v.* McCormick, 66 Ind. 243; Meyer *v.* Hehner, 96 Ill. 400. So, in general, where one has been the agent constituted and accredited to carry on business for another, his authority to bind his principal continues after actual revocation as to those who have been accustomed to deal with him as such agent, until notice of the revocation of his agency is brought home to them. Claflin *v.* Lenheim, 66 N. Y. 301; Robertson *v.* Cloud, 47 Miss. 208; Beard *v.* Kirk, 11 N. H. 397; McNeilly *v.* Continental Ins. Co., 66 N. Y. 23. So, where the defendants who had employed A. as steward to purchase supplies for them of the plaintiff, afterwards ceased to employ him, but did not notify the plaintiff thereof except by advertising for proposals for contracts, and A. afterwards purchased supplies of the plaintiff which were charged to the defendants, they were held liable for their price. Fellows *v.* Hartford & N. Y. Steamboat Co., 38 Conn. 197. So, where delivery of a balance of wood due under a contract was made to an agent whose authority to receive it had been revoked, his acceptance was held to be good, as the vendor had not been notified of the revocation. Barkley *v.* Rensselaer, &c. R. R. Co., 71 N. Y. 205; Hatch *v.* Coddington, 95 U. S. 48; Rice *v.* Isham, 4 Abb. App. 37. So, where an agent to sell sewing-machines with power to warrant them, after his agency had been revoked and his successor had been appointed, sold a machine with warranty, it was held that his principal was bound by the warranty. Eadie *v.* Ashbaugh, 44 Iowa, 519; Wright *v.* Herrick, 128 Mass. 240. — Ed.]

[2] Salte *v.* Field, 5 T. R. 215, per Buller, J.; Anon. *v.* Harrison, 12 Mod. 346; Hazard *v.* Treadwell, 1 Str. 506; 2 Liverm. on Agency, 306, 310 (ed. 1818); 2 Kent, Comm. Lect. 41, p. 644 (4th ed.); Morgan *v.* Stell, 5 Binn. 305; Story on Bailm. § 208; 1 Bell, Comm. 413 (4th ed.); Id. pp. 488, 490 (5th ed.); Bowerbank *v.* Morris, Wallace, R. 118.

[3] 3 Chitty on Com. & Manuf. 197.

[4] Ante, §§ 127, 443.

§ 471. Pothier has stated the reason in succinct but accurate terms, illustrating it by referring to the case of payments, made in ignorance of the revocation, where the principal is clearly bound. "The reason," says he, "is, that the mistake of the debtor, who pays after the revocation of the procuration, arises rather from the fault of the creditor, who ought to apprise him of the revocation, than of the debtor himself, who, seeing an authority to receive, and having no reason to suppose that it has been revoked, has a sufficient ground for making the payment accordingly. Therefore it is not just that he should suffer from this mistake, and be liable to a second payment; the creditor, who alone is in fault, is the only person who should suffer."[1]

§ 472. The same persuasive doctrine is fully recognized in the Roman law. "Sed, si quis mandaverit, ut Titio solvam, deinde vetuerit eum accipere, si ignorans prohibitum eum accipere solvam, liberabor. Sed si sciero, non liberabor.[2] Si Titium omnibus negotiis meis præposuero, deinde vetuero eum, ignorantibus debitoribus, administrare negotia mea; debitores ei solvendo, liberabuntur. Nam is qui omnibus negotiis suis aliquem proponit, intelligitur etiam debitoribus mandare, ut procuratori solvant.[3] Dispensatori, qui, ignorante debitore, remotus est ab actu, recte solvitur. Ex voluntate enim Domini ei solvitur; quam si nescit mutatam, qui solvit, liberatur."[4] The converse proposition, that a payment to an agent who has no authority, or whose authority is exceeded or known to be revoked, is invalid, is as clearly maintained.[5] "De quo palam proscriptum fuerit, Ne cum eo contrahatur, is præpositi loco non habetur. Non enim permittendum erit cum Institore contrahere. Sed, si quis nolit contrahi, prohibeat; cæterum, qui præposuit, tenebitur ipsâ præpositione."[6]

§ 473. Domat sums up the doctrine in the following language: "The power of factors and agents is determined by their revocation. But if, after they are recalled, they treat with persons, who knew nothing of their being recalled, what they shall have transacted will oblige the master, unless the revocation has been published, if it was

[1] Pothier on Oblig. by Evans, n. 80, n. 474 (in French edition, n. 80, 510).

[2] Dig. Lib. 46, tit. 3, l. 12, § 2; Pothier, Pand. Lib. 46, tit. 3, n. 31; 1 Domat, B. 1, tit. 16, § 3, art. 9.

[3] Dig. Lib. 46, tit. 3, l. 34, § 3; Pothier, Pand. Lib. 46, tit. 3, n. 31.

[4] Dig. Lib. 46, tit. 3, l. 51; Pothier, Pand. Lib. 46, tit. 3, n. 31; Inst. Lib. 3, tit. 27. § 10.

[5] Dig. Lib. 46, tit. 3, l. 34, § 4; Pothier, Pand. Lib. 46, tit. 3, n. 33; Dig. Lib. 14, tit. 3, l. 11, § 2; Pothier, Pand. Lib. 14, tit. 3, n. 7.

[6] Dig. Lib. 14, tit. 3, l. 11, § 2; Pothier, Pand. Lib. 14, tit. 3, n. 7.

the custom so to do, or that by other circumstances the person who treated with the factor might have known that he ought not to have treated with him."[1] Indeed, this may be said to be the universal rule laid down in all modern jurisprudence.[2]

§ 474. In the next place, as to the modes by which an authority may be revoked. It may be express, as by a direct and formal declaration, publicly made known, or by an informal writing, or by parol; or it may be implied from circumstances.[3] What circumstances will or will not amount to a revocation, or to notice of a revocation, by implication, cannot be stated with any definite certainty. But there are some acts which admit of little or no doubt. Thus, for example, if the principal appoints another person to do the same act, this will ordinarily be construed to be a revocation of the power of the former agent.[4] The same presumption existed in the civil law. "Julianus ait: Eum, qui dedit diversis temporibus procuratores duos, posteriorem dando priorem prohibuisse videri."[5] The same doctrine is recognized in the French law.[6] This presumption, however, arises only in cases where there is an incompatibility in the exercise of the authority by both; for, if the original agent has a general authority, and the second agent is appointed only for a special object or purpose, there the revocation will operate only *pro tanto*, and not as a total revocation. The maxim of the Roman law is as follows: "In toto jure generi per speciem derogatur, et illud potissimum habetur, quod ad specium directum est."[7] On the other hand, if the first authority is special and the second authority is general, it seems to have been thought that the presumption ought to be the other way; namely, that the second is not designed to operate as a revocation of

[1] 1 Domat, B. 1, tit. 16, § 8, art. 9, by Strahan.

[2] Pothier, de Mandat, n. 121; 1 Bell, Comm. § 413 (4th ed.); Id. pp. 488-490 (5th ed.).

[3] Story on Bailm. §§ 207, 208; Morgan *v.* Stell, 5 Binn. 305; Copeland *v.* Merc. Ins. Co. 6 Pick. 198; Smith on Merc. Law, pp. 131, 132 (3d ed. 1843).

[4] Morgan *v.* Stell, 5 Binn. 305; Copeland *v.* Merc. Ins. Co. 6 Pick. 198; Story on Bailm. § 208. [But it was held in Davol *v.* Quimby, 11 Allen, 208, that an agent's authority to collect money for his principal is not revoked by the mere appointment of another agent with like authority; and a payment by the debtor to the first agent, after receiving notice of the appointment of the second, was held to discharge the debt, when there was no other evidence of a revocation of the first agent's authority.]

[5] Dig. Lib. 3, tit. 3, l. 31, § 2; Pothier, Pand. Lib. 3, tit. 3, n. 27; 1 Domat, B. 1, tit. 15, § 4, art. 2.

[6] Pothier, de Mandat, n. 114, 115.

[7] Dig. Lib. 50, tit. 17, l. 80; Pothier, de Mandat, n. 115-117.

the first.[1] But this may probably depend upon very nice considerations.

§ 475. A revocation may also arise by implication or presumption from various other circumstances.[2] Thus, if the principal should intrust another with authority to collect certain debts for him, and should deliver him at the time the vouchers or instruments, negotiable or otherwise, by which such debts are evidenced, and which are to be delivered to the debtors when paid; and afterwards the principal should take back the vouchers or other instruments, that will be an implied revocation of the authority of the agent.[3] So, if the principal should himself collect the debts, that also will be an implied revocation.

§ 476. We have already stated, that the general rule is, that the principal may revoke the authority of his agent at his mere pleasure.[4] But this is open to some exceptions, which, however, are entirely consistent with the reason upon which the general rule is founded. One exception is, when the principal has expressly stipulated that the authority shall be irrevocable, and the agent has an interest in its execution. Both of these circumstances must concur; for, although in its terms an authority may be expressly declared to be irrevocable, yet, if the agent has no interest in its execution, and there is no valid consideration for it, it is treated as a mere

[1] Pothier, de Mandat, n. 15.

[2] [In Hall *v.* Wright, E. B. & E. 746, 798, Pollock, C. B., says: "It must be conceded on all hands that there are contracts to which the law implies exceptions and conditions which are not expressed. All contracts for personal services which can be performed only during the lifetime of the party contracting, are subject to the implied condition that he shall be alive to perform them; and should he die, his executor is not liable to an action for the breach of contract occasioned by his death. So a contract by an author to write a book, or by a painter to paint a picture within a reasonable time, would, in my judgment, be deemed subject to the condition that, if the author became insane, or the painter paralytic, and so incapable of performing the contract, by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death." In Robinson *v.* Davison, L. R. 6 Exch. 269, the plaintiff had made a contract with the defendant that the defendant's wife should play the piano at a concert to be given by the plaintiff on a specified day. She was, on the day in question, unable to perform through illness. In an action for the breach of the contract, it was held that the wife's illness and consequent incapacity was a good defence. See Dickey *v.* Linscott, 20 Me. 453; Knight *v.* Bean, 22 Me. 531; Fenton *v.* Clark, 11 Vt. 557; Hubbard *v.* Beldin, 27 Vt. 645; Fuller *v.* Brown, 11 Met. 440; Fahy *v.* North, 19 Barb. (N. Y.) 341; Wolfe *v.* Howe, 24 Barb. (N. Y.) 174; Jarvell *v.* Farris, 6 Mo. 159. — G.]

[3] Pothier, de Mandat, 118; [Wallace *v.* Goold, 91 Ill. 15]. [4] Ante, § 462.

nude pact, and is deemed in law to be revocable upon the general principle, that he alone who has an interest in the execution of an act is also entitled to control it.

§ 477. But, where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is a part of a security, there, unless there is an express stipulation, that it shall be revocable, it is, from its own nature and character, in contemplation of law, irrevocable, whether it is expressed to be so upon the face of the instrument, conferring the authority, or not.[1] Thus, for example, if a power of attorney to levy a fine is executed, as a part of a security to a creditor, the power is irrevocable.[2] So, if a letter of attorney to sell a ship is taken as a security upon a loan of money, it is irrevocable.[3] So, if the principal assigns all

[1] Smith on Merc. Law, 71, 72 (2d ed.); Id. B. 1, ch. 5, § 4, pp. 131, 132 (3d ed. 1843); 3 Chitty on Com. & Manuf. 223, 224; Hunt *v.* Rousmanier's Adm'r, 2 Mason, 244; Id. 342; s. c. 8 Wheat. 174; 1 Peters, 1; Bromley *v.* Holland, 7 Ves. 28; Lepard *v.* Vernon, 2 V. & Beam. 51; Watson *v.* King, 4 Camp. 272; 2 Kent, Comm. Lect. 41, pp. 643, 644 (4th ed.); Gaussen *v.* Morton, 10 B. & Cressw. 731; Story on Bailm. § 209. See also Metcalf *v.* Clough, 2 Mann. & Ryl. 178; Smyth *v.* Craig, 3 Watts & Serg. 14. This doctrine was much considered in the case of Hunt *v.* Rousmanier's Adm'r, 8 Wheat. 174; s. c. 1 Peters, 1; and the distinction between a mere power, and a power coupled with an interest, was there clearly pointed out. On that occasion, Mr. Chief Justice Marshall explained, what was meant by a power coupled with an interest, and said: "It becomes necessary to inquire, what is meant by the expression 'a power coupled with an interest.' Is it an interest in the subject, on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest, which can protect a power after the death of a person, who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. The words themselves would seem to import this meaning. 'A power coupled with an interest,' is a power, which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But, if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases, when the interest commences, and, therefore, cannot, in accurate law language, be said to be 'coupled' with it." See also Com. Dig. *Attorney*, C. 9, 10. [The use of the word "irrevocable" in a power of attorney does not prevent its revocation by the principal, unless it is coupled with a consideration, or the agent is interested in its execution; nor does it confer the power upon the agent to dispose of the property otherwise than as directed by the principal. MacGregor *v.* Gardner, 14 Iowa, 326; Smart *v.* Sanders, 5 Mann. Gr. & Scott, 895; Knapp *v.* Alvord, 10 Paige, 205; Marfield *v.* Douglas, 1 Sandf. Sup. Ct. (N. Y.) 360.]

[2] Walsh *v.* Whitcomb, 2 Esp. 565.

[3] Hunt *v.* Rousmanier's Adm'r, 2 Mason, 244; Id. 342; s. c. 8 Wheat. 274; 1 Peters, 1.

his effects for the benefit of his creditors, and gives the assignee a power of attorney to collect and receive all debts and outstanding claims, the power is irrevocable.[1] So, if a power of attorney to sell lands is given to a creditor to pay his debts out of the proceeds of the sale, the power is irrevocable.[2] So, a remittance to an agent of money or goods, to be delivered to a creditor in discharge of his debt, is irrevocable, after the creditor has assented thereto, and signified his assent to the agent.[3] The ground of this doctrine is that a party shall not be at liberty to violate his own solemn engagement, or to vacate his own security by his own wrongful act; for that would be to enable him to perpetrate a fraud upon innocent persons, who have placed implicit confidence in him, which is against the clearest principles of justice and equity. But a power of attorney, although irrevocable by the party, and although founded upon a valuable consideration, or given as a security, is nevertheless, as we shall presently see, revoked by the death of the party, unless it be also coupled with an interest.[4]

§ 478. Secondly. In the next place, the agency may be determined by the renunciation of the agent.[5] This renunciation may be before any part of the authority is executed, or when it is in part executed.[6] But, in either case, if the agency is founded upon a valuable consideration, the agent, by renouncing it, makes himself liable for the damages which his principal may sustain thereby.[7] If the agency is purely voluntary and gratuitous, there, according to our law, the principal will not be entitled to any damages for its non-execution. But if it was in part executed, and then renounced, and the principal sustains damages thereby, the agent will be held responsible therefor, upon the known distinction between nonfeasance

[1] Walsh *v.* Whitcomb, 2 Esp. 565.

[2] Gaussen *v.* Morton, 10 B. & Cressw. 731. [Goodwin *v.* Bowden, 54 Me. 424.]

[3] Hodgson *v.* Anderson, 3 B. & Cressw. 842; 2 Story on Eq. Jurisp. §§ 1041-1043; Ante, § 465. [The exception existing in the case of a power coupled with an interest, does not, *it seems*, apply from the mere fact that the principal and agent are partners. Travers *v.* Crane, 15 Cal. 127; Creager *v.* Link, 7 Md. 267. — R.]

[4] Post, §§ 488, 489.

[5] [See Case *v.* Jennings, 18 Texas, 661.]

[6] Story on Bailm. § 202.

[7] Story on Bailm. § 436; Jones on Bailm. 101; 3 Black. Comm. 157; Elsee *v.* Gatward, 5 T. R. 143; Thorne *v.* Deas, 4 John. 84; [White *v.* Smith, 6 Lans. (N. Y.) 5].

and misfeasance, in cases of gratuitous agency.[1] But in all cases, where the agent renounces his agency, he would seem to be bound to give notice thereof to the principal; and if he does not, and damage is thereby sustained, it may, perhaps, if the omission be fraudulent, give rise, even in our law, to a claim for damages, even though it be a case of gratuitous agency.[2]

§ 479. The Roman law, upon this point, differed in some respects from our law. In that law, if an agent even gratuitously undertook to perform a particular business or act, he was bound to perform it, if he was able to perform it, and no just excuse intervened. And if he did not, and the principal sustained any damage thereby, the agent was responsible therefor.[3] "Sicut autem liberum est," says the Digest, "mandatum non suscipere, ita susceptum consummari oportet, nisi renunciatum sit. Renunciari autem ita potest, ut integrum jus mandatori reservetur, vel per se, vel per alium, eandem rem commode explicandi, aut si redundet in eum captio, qui suscepit mandatum. Et quidem, si is, cui mandatum est, ut aliquid mercaretur, mercatus non sit, neque renunciaverit, se non empturum, idque suâ, non alterius culpâ fecerit, mandati actione teneri eum convenit. Hoc amplius tenebitur (sicuti Mela quoque scripsit), si eo tempore per fraudem renunciaverit, cum jam recte emere non possit."[4] Again: "Et, si susceptum non impleverit, tenetur."[5] And again: "Ad comparandas merces datâ pecuniâ, qui mandatum suscepit, fide ruptâ, quanti, interest mandatoris, tenetur."[6] And again: "Qui mandatum suscepit, si potest id explere, deserere promissum officium non debet; alioquin, quanti mandatoris intersit, damnabitur."[7] If he could not perform the act, he was bound to give notice to the principal, if practicable; otherwise, he was responsible in damages. "Si vero intelligit, explere se id officium non posse, id ipsum, cum primum poterit, debet mandatori nunciare; ut is, si velit, alterius operâ utatur. Quod si, quum possit nunciare, cessaverit, quanti

[1] Story on Bailm. §§ 9, 164–172.

[2] See Dig. Lib. 17, tit. 1, l. 22, § 11, cited Post, § 479; [Barrows v. Cushway, 37 Mich. 481].

[3] Story on Bailm. §§ 164–172; Inst. Lib. 3, tit. 27, § 11; 1 Domat, B. 1, tit. 15, § 4, art. 3–6.

[4] Dig. Lib. 17, tit. 1, l. 22, § 11; Pothier, Pand. Lib. 91, tit. 1, n. 25; Id. n. 80.

[5] Dig. Lib. 17, tit. 1, l. 5, § 1; Pothier, Pand. Lib. 17, tit. 1, n. 25.

[6] Cod. Lib. 4, tit. 35, l. 16; Pothier, Pand. Lib. 17, tit. 1, n. 25; Id. n. 80.

[7] Dig. Lib. 17, tit. 1, l. 27, § 2; Pothier, Pand. Lib. 17, tit. 1, n. 26; Id. n. 80.

mandatoris intersit, tenebitur. Si, aliqua ex causâ non poterit nunciare, securus erit."[1] But if the principal sustained no damage by the renunciation, then the agent was not liable in any action on account of his renunciation. "Mandavi, ut negotia gereres; si nihil deperierit, quamvis nemo gesserit, nulla actio est; aut si alius idonee gesserit, cessat mandati actio. Et in similibus hoc idem erit probandum."[2] The same rule seems to prevail in those modern nations

[1] Dig. Lib. 17, tit. 1, l. 27, § 2; Pothier, Pand. Lib. 17, tit. 1, n. 26; Id. n. 80.

[2] Dig. Lib. 17, tit. 1, l. 8, § 6; Pothier, Pand. Lib. 17, tit. 1, n. 27; Inst. Lib. 3, tit. 27, § 11. [The mandate in the Roman law was an agency of a very peculiar kind: although gratuitous, it was governed by much stricter rules than agencies for hire. It had a sacred origin in religion and the ties of friendship. It was a particular confidence by which one friend intrusted important affairs to the zeal of another. The mandator, taking in his right hand the right hand of the mandatary (*manus datio*), charged him with a special confidence of friendship. According to commentators, the mandate, accompanied with a form of stipulation, is shown in a play of Plautus:—

TYNDARUS. Ne tu me ignores, cum extemplo meo e conspectu abcesseris,
Quom me servum in servitute pro te hic reliqueris;
Tuque te pro libero esse ducas, pignus deseras:
Neque des operam, pro me ut hujus reducem facias filium.
Scito te hinc minis viginti æstimatum mittier.
Fac fidelis sis fideli: cave fidem fluxam geras.
Nam pater, scio, faciet, quæ illum facere oportet, omnia.
Serva in perpetuum tibi amicum me, atque hunc inventum inveni.
Hæc per dexteram tuam, te dextera retinens manu,
Obsecro, infidelior mihi ne fuas, quam ego sum tibi.
Tu hoc age; tu mihi herus nunc es, tu patronus, tu pater:
Tibi commendo spes opesque meas.
PHILOCRATES. *Mandavisti satis.*
Satin' habes, mandata quæ sunt, facta si refero?
TYNDARUS. *Satis.*
— *Captivi*, Act 2, sc. 3.

The mandate bore three striking marks of its origin. It must be gratuitous: if any thing were paid for the service (except for professional services under the title of *honorarium*), the obligation lost its high rank, and sank among other agreements for hire. It was not sufficient that the mandatary exercised as much care in his charge as he practised in his own matters: he was bound to the care of a prudent person, *sui juris*. By a judgment against him for the breach of his duty, he was rendered infamous; one of the results of which, in the time of the republic, was a perpetual loss of the right of voting, and of holding office of any kind. This sufficiently explains why the mandatary, having once undertaken the charge, could not lightly abandon it. "Every one is free to refuse accepting a mandate; but if it is once accepted, it must be executed, or else renounced soon enough to permit the mandator executing it himself or through another. For, unless the renunciation is made so that the mandator is still in a position to do this, an action *mandati* may be

which have derived the basis of their jurisprudence from the Roman law.[1]

§ 480. Thirdly. In the next place, as to the revocation of the agency by operation of law. This, as we have seen, may arise in various ways. And first, where the agency terminates by the expiration of the period, during which it is to exist and to have effect.[2] Thus, for example, if an agency is created by the principal to endure for a year, it becomes extinct when that year has expired. So, if a person, about to depart on a voyage, should, by power of attorney, appoint an agent to manage his affairs until his return home, there, upon his return home, the authority would expire by its own limitation.[3] Indeed, Pothier contends, that if a power is given by a person, going abroad, to an agent to manage his affairs, without containing any words of limitation as to its duration, it ought to be presumed to be revoked upon his return home, unless there are some circumstances in the case to repel that presumption; such as allowing the agent to act in the agency, without objection, after his return home.[4]

§ 481. Fourthly. A revocation by operation of law may be, by a change of condition or of state, producing an incapacity of either party.[5] This proceeds upon a general rule of law, that the derivative authority expires with the original authority, from which it proceeds. The power of constituting an agent is founded upon the right of the principal to do the business himself; and when that right ceases, the right of creating an appointment, or of continuing

brought in spite of the renunciation of the mandatary, unless some good reason has prevented him making the renunciation, or making it within a proper time." Inst. Lib. 3, tit. 26. — G.]

[1] Erak. Inst. B. 3, tit. 3, § 40; 1 Domat, B. 1, tit. 15, § 3, art. 1, 12; Id. § 4, art. 3–5; Pothier, de Mandat, n. 38–45; Story on Bailm. § 164.

[2] 3 Chitty on Com. & Manuf. 233; Blackburn *v.* Scholes, 2 Camp. 341–344; Comm. Dig. *Attorney*, B. 9, 10; 1 Bell, Comm. § 413 (1) (4th ed.); Id. pp. 488–490 (5th ed.); Smith on Merc. Law, 72 (2d ed.); Id. pp. 131, 132 (3d ed. 1843); Dickenson *v.* Lilwall, 4 Camp. 279. [When the inhabitants of a town have by vote authorized their treasurer to borrow money for the adjustment of a certain state tax, and the tax has been adjusted without the necessity of borrowing money, his authority to borrow money upon that vote thereupon ceases. Benoit *v.* Conway, 10 Allen, 528.]

[3] 1 Bell, Comm. § 413 (4th ed.); Id. pp. 488–490 (5th ed.); Pothier on Oblig. n. 474 (n. 509 of French ed.); Pothier, de Mandat, n. 119.

[4] Pothier, de Mandat, n. 119. See also Id. n. 112.

[5] Story on Bailm. § 206; Pothier, de Mandat, n. 111, 112; [Gilbert *v.* Holmes, 64 Ill. 548].

the appointment of an agent already made, for the same purpose, must cease also.[1] In short, the derivative authority cannot generally mount higher, or exist longer, than the original authority. Thus, if an unmarried woman should, as principal, execute a power of attorney, or give any other authority to an agent, and afterwards she should marry, the marriage would, *ipso facto*, amount to a revocation of the power; for a married woman has, in general, by our law, no right to authorize an agent to do any act in her name, or to engage in any contract for her, or to dispose of any of her property.[2] So, if a principal should become insane, that would or might operate as a suspension or revocation of the authority of his agent during the continuance of the insanity; for the party himself, during his insanity, could not personally do a valid act; and his agent cannot, in virtue of a derivative authority, do any act for and in the name of his principal, which he could not lawfully do for himself.[3]

[1] Hunt *v.* Rousmanier's Adm'r, 8 Wheat. 174, 202–204; Pothier, de Mandat, n. 103. [The question of the effect of war upon agencies has been frequently raised in the courts of this country since the late war, and the decisions have not been uniform. In the Supreme Court of the United States, in the case of Insurance Co. *v.* Davis, 95 U. S. 425, it was decided that a tender of payment of a premium upon an insurance policy to a former agent of the company resident in Virginia during the war did not bind the company, but the payment of a debt by a debtor to an agent of an alien enemy, where such agent resides in the same state with the debtor, has been held good. Conn *v.* Penn, Pet. C. C. 496; Buchanan *v.* Curry, 19 Johns. 141. That the war revoked the agency was held in Howell *v.* Gordon, 40 Ga. 302, and the contrary was held in Maloney *v.* Stephens, 11 Heisk. 738; Darling *v.* Lewis, 11 Ibid. 125; Jones *v.* Harris, 10 Ibid. 98. See also Conley *v.* Burson, 1 Heisk. 145; Fretz *v.* Storer, 22 Wall. 198; United States *v.* Grossmayer, 9 Wall. 72; Blackwell *v.* Willard, 65 N. C. 555; Robinson *v.* Int. Life Ass. Co., 42 N. Y. 54; Sands *v.* N. Y. Life Ins. Co., 50 N. Y. 626; Manhattan Life Ins. Co. *v.* Warwick, 20 Gratt. 614. — Ed.]

[2] Anon. 1 Salk. 117, 399; 2 Kent, Comm. Lect. 41, p. 645 (4th ed.); White *v.* Gifford, 1 Roll. Abridg. 331, title *Authoritie*, E. pl. 4; Anon. W. Jones, 388; Charnley *v.* Winstanly, 5 East, 266; Story on Bailm. § 206; [M'Carr *v.* O'Ferrall, 8 Cl. & F. 30].

[3] Hunt *v.* Rousmanier's Adm'r, 8 Wheat. 174, 201–204. This is clear, where the party's lunacy is established under an inquisition, or where he is put under guardianship. But some doubt seems to be entertained, whether, before such inquisition or guardianship, there is any implied suspension or revocation of the agent's authority. Mr. Bell (1 Bell, Comm. § 413, pp. 395, 396, 4th ed.; Id. pp. 488–490, 5th ed.) considers insanity, not so established, to be no suspension or revocation of the authority. He says, in the 5th edition (the language in the 4th edition slightly differs): "Insanity is not an implied natural termination to a mandate; nor is there an existing will to recall the former appointment; nor is the act notorious, by which the public may be aware of such failure of capacity. It was to this interesting question chiefly,

§ 482. Upon similar grounds, the bankruptcy of the principal operates as a revocation of the authority of his agent, touching any

that the metaphysical discussion, to which I have already alluded, was applied. But the strong practical ground of good-sense on which the question was disposed of, as relative to the public, was, that insanity is contradistinguished from death by the want of notoriety; that all general delegations of power on which a credit is once raised with the trading world, subsist in force to bind the grantor, until recalled by some public act or individual notice; and that, while they continue in uninterrupted operation, relied on by the public, they are, in law, to be held as available generally; leaving particular cases to be distinguished by special circumstances of *mala fides*. The question does not appear to have occurred in England; but the opinion of very eminent English counsel was taken in a case, which was tried in Scotland, and they held the acts of the procurator to be effectual to the public against the estate of the person, by whom the procuratory was granted." He states, in his note, the Scottish case, in the following words: "Pollock against Paterson. The case, in which this question occurred to be tried, was compromised (10th December, 1811, 16 Faculty Decis. 369) after the first decision given on the question. The opinions of the judges are peculiarly worthy of perusal; not being confined to the narrow state of the question, as it occurred technically, but extending to a large and comprehensive discussion of the general question, as to the effect of insanity on such powers." In another note, he refers to the opinions of counsel taken in England, in these words: "After stating the terms of the procuration, and that after the insanity of the grantor, the procurator had continued to carry on the business of a banker for the principal, the question put was, 'Whether, in these circumstances, the transactions of Mr. John Paterson, under his father's procuration, are good to those who transacted with him, from the date of it to the period of stopping.' The answer by Sir Vicary Gibbs (afterwards Lord Chief Justice of the Common Pleas), Sir Samuel Romilly, and Mr. Adam (now Lord Chief Commissioner of the Scottish jury court), was, 'We think they are good.'" Mr. Chancellor Kent, in his Commentaries, inclines to the same opinion. 2 Kent, Comm. Lect. 41, p. 645 (4th ed.); Smith on Merc. Law, p. 132 (3d ed. 1843). In Wallis *v.* Manhattan Bank, 2 Hall, 495, it was held by the court, that the lunacy of a person, who has executed a power of attorney, does not operate to revoke it, at least until the fact of his lunacy has been properly established by an inquisition. Would a deed or a sale, executed personally by a party manifestly insane at the time, be valid? If not, can his agent be in a better condition, if the agent is to execute the deed or do the act, in the name of his principal, and not in his own name? But see Thomson on Bills, pp. 226, 227 (2d ed. 1836), cited at large; Post, § 494, note. [But the fact that a person was put under guardianship for insanity does not necessarily prove that an agency previously created by him has been terminated. Motley *v.* Head, 43 Vt. 633. As a general rule, however, the after occurring insanity of a principal operates *per se* as a revocation or suspension of the powers of an agent, except where a consideration has been previously advanced, so that the power becomes coupled with an interest. Matthiessen, &c. Co. *v.* McMahon, 38 N. J. L. 536. The question was lately raised in an interesting case and carefully considered by the court, and it was held somewhat in variance with former decisions, that where the defendant had given his wife authority to deal with the plaintiff, a tradesman, and had held her out as his agent, and afterwards became insane, and during his insanity his wife ordered goods of

rights of property of which he is devested by the bankruptcy;[1] for the bankrupt thereby ceases to be the owner, and consequently is incapable of personally passing any title to it; and the act of his agent cannot have any higher validity.[2] But, as to other rights and property which do not pass by the bankruptcy, but remain personally in the bankrupt (as, for example, the rights and property which he holds as trustee or as guardian or as executor), the authority of his agent will not be suspended or revoked by his bankruptcy.[3] So, if he has before his bankruptcy executed a bill of sale of a ship, and given a letter of attorney to sign an indorsement on the certificate of registry, in compliance with law, to make the sale complete, the power is not revoked by his bankruptcy; for it is but a formal act, which a court of equity would compel him to execute.[4]

§ 483. And here, again, the same exception exists in relation to mere cases of incapacity which has been already suggested in relation to the right of revocation by the principal.[5] The doctrine does not apply to the case of an authority coupled with an interest; for that may still be executed, notwithstanding the marriage or insanity or bankruptcy of the principal, for the plain reason, that it need not be executed in the name of the principal; but it will be valid, if executed in the name of the agent.[6] Therefore, where a

the plaintiff, the latter being ignorant of her husband's insanity, the husband was liable for the goods. Drew *v.* Nunn, L. R. 4 Q. B. D. 661. See Davis *v.* Lane, 10 N. H. 156, to same effect. — Ed.]

[1] [See Ogden *v.* Gillingham, Baldwin, 38.]

[2] 2 Kent, Comm. Lect. 41, p. 644 (4th ed.); Minett *v.* Forrester, 4 Taunt. 541; 1 Bell, Comm. § 413 (4th ed.); Id. pp. 488–490 (5th ed.); Ante, §§ 349, 408; 3 Chitty on Com. & Manuf. 223, 224; Story on Bailm. § 211; Parker *v.* Smith, 16 East, 382. In this last case, Lord Ellenborough held: "And, inasmuch as the bankrupt was not competent, after his bankruptcy, to pay or apply this fund himself, in satisfaction of these claims of the assured, it follows, as a consequence, that he could not authorize his broker so to do: otherwise the derivative and implied authority would be stronger and more extensive than the original and principal authority of the party himself; which cannot be. The consequence is, that the authority of the agent, the broker's, was virtually countermanded and extinct by that act of bankruptcy, by which the bankrupt's own original power over the subject-matter ceased, and became transferred to others." [*Ex parte* Snowball, *Re* Douglas, L. R. 7 Ch. 534.]

[3] 3 Chitty on Com. & Manuf. 223; Dixon *v.* Ewart, 3 Meriv. 322; Smith on Merc. Law, 72 (2d ed.); Id. B. 1, ch. 5, §§ 131, 132 (3d ed. 1843); Post, § 486.

[4] Dixon *v.* Ewart, 3 Meriv. 322.

[5] Ante, § 477.

[6] Alley *v.* Hotson, 4 Camp. 325; 1 Bell, Comm. § 413 (4th ed.); Id. pp. 488–490 (5th ed.); Ante, § 477.

factor has possession of the goods of his principal, with a power to sell, and has made advances on the consignment, he is still entitled to sell, for his indemnification, to the extent of such advances, notwithstanding the bankruptcy of his principal.[1]

§ 484. Principles very similar are adopted in the jurisprudence of foreign countries. Thus, Pothier lays it down that an authority ceases by the change of condition of the principal. As, if a creditor is a woman, who afterwards marries, her authority, previously given to an agent to receive money for her, is revoked by her change of condition; and payment to him, if the debtor knows of the marriage, will be invalid.[2] So, a power given by a person having a quality or character to receive for the creditor, expires when that quality or character ceases. Thus, if the tutor of a minor gives a power to receive a debt due to the minor, the debtor cannot safely pay, upon the authority of the power, after the minority has expired; because the quality or character of the tutor, who gave the authority, having ceased, a payment to himself would be void and ineffectual.[3] This results from the maxim of the Roman law: "Quod jussu alterius solvitur, pro eo est, quasi ipsi solutum esset;"[4] since the maxim tacitly involves the converse proposition, that, where payment is made to a person having no authority to receive it, it is no payment to the creditor. So, if a person who has given an authority becomes incapable, by a change of his condition, as if he is interdicted from acting for himself, and is placed under the guardianship of a curator, the authority is revoked.[5]

§ 485. In the next place, as to the incapacity of the agent. Here the same rule does not reciprocally apply in its full extent; for,

[1] 1 Bell, Comm. § 413 (4th ed.); Id. pp. 488–490 (5th ed.). Mr. Bell insists upon other exceptions, which, perhaps, may fall within the same reason. He says: "Express or tacit revocation, by act of the principal, or by death, bankruptcy, or insanity, will have no effect, either to deprive the factor of the benefit of his authority, in extricating himself from transactions already begun, or from the consequences of his having acted; or to deprive others, who have relied on his powers, of the benefit of the transactions, on which they have previously entered with him; or even to disturb transactions entered into, while he still appeared to hold his authority undiminished." Id. p. 489 (5th ed.). See also Ersk. Inst. B. 3, tit. 3, § 40; Ante, § 466. [*In re* Daniels, 13 Nat. Bank. Reg. 46.]

[2] Pothier on Oblig. by Evans, n. 475 (n. 511 of the French edition); Pothier, de Mandat, n. 111.

[3] Post, § 500.

[4] Pothier on Oblig. by Evans, n. 476 (n. 512 of the French edition); Dig. Lib. 50, tit. 17, l. 180; Pothier, de Mandat, n. 112.

[5] Pothier, de Mandat, n. 111.

although an agent may be incapacitated to act for himself, he is not, in all cases necessarily incapacitated to act for another. Thus, for example, although an infant cannot act for himself, he may, nevertheless, be the agent of another person.[1] So, a married woman, at least unless she is prohibited by her husband, may also be the agent of another person.[2] And if she is appointed an agent before marriage, the marriage does not, *per se*, necessarily operate as a revocation of her agency; since there is, or may be, nothing in the marriage incompatible with her executing an authority or an agency. *A fortiori*, where her agency is coupled with an interest, it is not only not revoked by her marriage, but it is irrevocable; for the husband and wife have an interest in its execution.[3]

§ 486. The case of the bankruptcy of the agent is, in some respects, governed by the same rule. It does not necessarily suspend or revoke the power of the bankrupt to act as an agent for another, by doing a formal act, which passes no interest; such, for example, as executing a deed in the name of another.[4] Neither does it prevent him from doing an act as principal, where it is the mere execution of an existing trust, which he might be compelled to execute.[5] Neither will it affect his right as a factor, with the consent of his assignees, to enforce his lien for commissions and advances, or for a general balance due to him from his principal, upon the goods of the latter, or the proceeds thereof, against the purchaser of the goods.[6] But it is said, that it will amount to a revocation of his authority to receive any money from the purchaser, or from other persons, upon the account of his principal.[7] By the foreign law, also, the bankruptcy of the agent operates as a revocation of his authority, for the satisfactory reason, that it is presumed that the confidence of the principal in him is thereby destroyed.[8]

[1] Ante, § 7; Thomson on Bills of Exchange, p. 220 (2d ed. 1836).

[2] Ante, § 7. Query, whether the prohibition of the husband would, in all cases, incapacitate the wife to do a mere ministerial act for another, as his agent, involving no labor or duty inconsistent with her duty to her family, as, for example, to deliver a deed?

[3] Anon. 1 Salk. 117; Reignolds *v.* Davis, 12 Mod. 383; Marder *v.* Lee, 3 Burr. 1469, 1471.

[4] 2 Kent, Comm. Lect. 41, pp. 644, 645 (4th ed.); Dixon *v.* Ewart, 3 Meriv. 322; Ante, §§ 477, 482.

[5] Dixon *v.* Ewart, 3 Meriv. 322; Ante, § 482.

[6] Hudson *v.* Granger, 5 B. & Ald. 27, 31, 32.

[7] Hudson *v.* Granger, 5 B. & Ald. 27, 31, 32; 2 Kent, Comm. Lect. 41, p. 645 (4th ed.); Story on Bailm. § 211; [Audenried *v.* Betteley, 8 Allen, 302].

[8] Pothier, de Mandat, n. 120; Story on Bailm. § 211.

§ 487. The case of the insanity of the agent would seem to constitute a natural, nay, a necessary, revocation of his authority; for the principal cannot be presumed to intend, that acts done for him and to bind him, shall be done by one who is incompetent to understand, or to transact, the business which he is employed to execute. The exercise of sound judgment and discretion would seem to be required, in all such cases, as preliminaries to the due execution of the authority.

§ 488. Fifthly. A revocation may be, by operation of law, by the death either of the principal or of the agent. This is an ancient and well-settled doctrine of the common law.[1] It will make no dif-

[1] Littleton, § 66; Co. Litt. 52; Shipman *v.* Thompson, Willes, 104, 105; Wynne *v.* Thomas, Willes, 563, 565; Wallace *v.* Cooke, 5 Esp. 117, 118; Smith on Merc. Law, 72 (2d ed.); Id. pp. 131, 132 (3d ed. 1843); Bac. Abridg. *Authority*, E.; 3 Chitty on Comm. & Manuf. 223; 2 Kent, Comm. Lect. 41, pp. 645, 646 (4th ed.); Story on Bailm. §§ 203–205; Smout *v.* Ilbery, 10 Mees. & Wels. 1; Blades *v.* Free, 9 B. & Cressw. 167; Galt *v.* Galloway, 4 Peters, 332, 344; Rigs *v.* Cage, 2 Humph. (Tenn.) 350; Harper *v.* Little, 2 Greenl. 14; Ante, §§ 264, 477. In Cassiday *v.* McKenzie, 4 Watts & Serg. 282, the Supreme Court of Pennsylvania held, that a payment of money to an agent, after the death of his principal, the death being unknown to both parties, was good, and bound the estate of the principal. Mr. Justice Rogers, in delivering the opinion of the court, said: "But finally, it is contended, that a payment, after the death of the principal, is not good. It is conceded, that the death of the principal is, *ipso facto*, a revocation of a letter of attorney. But does it avoid all acts of the attorney, intermediate between the death of the principal and notice of it? In Salte *v.* Field, 5 T. R. 214, Mr. Justice Buller observes: 'It has been questioned, with respect to an agent acting under a power of attorney, whether acts, done by him before he knows of the revocation of his warrant, are good against the principal; and it seems, that the principal, in such a case, could not avoid the acts of his agents, done *bona fide*, if they were to his disadvantage, though he might consent to avoid such as were for his benefit.' And in Hazard *v.* Treadwell (Str. 506; 12 Mod. 346), it is ruled, that the credit, arising from an ostensible employment, continues, at least with regard to those who have been accustomed to deal on the faith of that employment, until they have notice of its being at an end, or till its termination is notorious. And these are principles founded on the most obvious justice. Thus, if a man is the notorious agent for another, to collect debts, it is but reasonable, that debtors should be protected in payments to the agent, until they are informed that the agency has terminated. But this, it is said, is only true of an agency terminated by express revocation, and does not hold of an implied revocation by the death of the principal. It would puzzle the most acute man to give any reason why it should be a mispayment when revoked by death, and a good payment when expressly revoked by the party in his lifetime. In Watson *v.* King, 4 Camp. 272, however, it is ruled, 'that a power of attorney, *though coupled with an interest*, is instantly revoked by the death of the grantor; and an act, afterwards, *bona fide* done under it by the grantee, before notice of the death of the grantor, is a nullity. Lord Ellenborough

ference, that the power is declared in express terms to be irrevocable; for, if it be not coupled with an interest, although irrevocable by

says, a power, coupled with an interest, cannot be revoked by the person granting it; but it is necessarily revoked by his death. How can a valid act be done in the name of a dead man?' It will be observed, that the reason is purely technical. How can a valid act be done in the name of a dead man? And it might with as much propriety be asked, How can a valid act be done by an agent, whose authority is revoked by his principal? But, notwithstanding the opinion thus confidently expressed, it is now an admitted exception, that, where the power or authority is coupled with an interest in the thing actually vested in the agent, then an act, done by him after the death of his principal, is good. And the reason given by Chief Justice Marshall, in Hunt *v.* Rousmanier's Adm'r (8 Wheat. 174), is, that the agent, having the legal title in the property, is capable of transferring it in his own name, notwithstanding the death of the principal; and the death of the principal has no operation upon his act. The power, given by the principal, is, under such circumstances, rather an assent or agreement, that the agent may transfer the property vested in him, free from all equities of the principal, than strictly a power to transfer. The whole reasoning of the court, in Hunt *v.* Rousmanier's Adm'r, shows their anxiety to rid themselves of the absurdity, into which a strict adherence to the principle, that death is a revocation of a power, would lead them. Why not place it on the rational ground, that, although the conveyance would be bad at law, yet it would be good in equity, when made *bona fide* without any notice whatever of the death of the principal? But, be this as it may, the principle does not apply here. There is no act to be done. This money has been paid by the debtor, and received by the agent, in good faith; and why should it not be good, when the authority is revoked by death, as it confessedly is, when expressly revoked by the principal in his lifetime? Here the precise point is, whether a payment to an agent, when the parties are ignorant of the death, is a good payment. In addition to the case in Campbell, before cited, the same judge, Lord Ellenborough, has decided, in 5 Esp. 117, the general question, that a payment after the death of the principal is not good. Thus, a payment of sailor's wages, to a person having a power of attorney to receive them, has been held void, when the principal was dead at the time of the payment. If, by this case, it is meant merely to decide the general proposition, that by operation of law, the death of the principal is a revocation of the powers of the attorney, no objection can be taken to it. But if it is intended to say, that this principle applies, where there was no notice of death, or opportunity of notice, I must be permitted to dissent from it. In addition, it is contrary to the opinion of Lord Loughborough in Tate *v.* Hilberts, 2 Ves., jr., where, on a question, whether a check, given by a dying person to a relation, but not presented in his lifetime, could be enforced, as *donatio causa mortis*, against the executor, he said, if the donee had received the money upon the check immediately after the death of the testator, and before the cashier was apprised of it, he was inclined to think no court would have taken it from him. And what would he have said, if the attempt had been made to subject the banker, when he was ignorant of the death? But, if this doctrine applies, why does it not apply to the case of factors, foreign or domestic, to commission merchants, to supercargoes, and mas-

the party, it is revoked by his death.[1] The doctrine seems to be a natural deduction or presumption of the actual intention of the parties. But it has this additional reason to support it, that, as the act must, if done at all, be done in the name of the principal, it is impossible that it can properly be done, since a dead man can do no act; and we have already seen that every authority, executed

ters of ships, and to various other agencies, which the necessities of commerce may require? In the case of a foreign factor, for example, has it been supposed, that his acts, after this implied revocation of authority, are void? Cases of this kind must often have occurred; and it would astonish the mercantile world to be informed, that the factor was liable on a contract, made in the name of his principal, because he was dead, a fact of which he was ignorant, and of which he could not by any possibility be informed; or that the merchant, who was trusting his goods on the credit of the principal, was to be cast on him, who may have been of doubtful solvency, for payment. Can it be, that a payment, made to an agent from a foreign country, and from one of our cities to the Western states, employed for the special purpose of collecting debts, is void, because his principal may have died the very day before the actual receipt of the money? That a payment may be good to-day, or bad to-morrow, from the accidental circumstance of the death of the principal, which he did not know, and which by no possibility he could know? It would be unjust to the agent and unjust to the debtor. In the civil law, the acts of the agent, done *bona fide* in ignorance of the death of his principal, are held valid and binding upon the heirs of the latter. The same rule holds in the Scottish law; and I cannot believe the common law is so unreasonable, notwithstanding the doubts expressed by Chancellor Kent, in the 2d volume of his Commentaries, p. 646." [Death of the principal immediately terminates an agency, and all dealings with the agent thereafter, although by parties ignorant of the principal's death, are void and of no effect. Davis *v.* Windsor Savings Bank, 46 Vt. 728; Campanari *v.* Woodburn, 15 C. B. 400; Wilson *v.* Edmonds, 4 Foster, 517; Scruggs *v.* Driver, 31 Ala. 274; Saltmarsh *v.* Smith, 32 Ala. 404; Gale *v.* Tappan, 12 N. H. 145; Houghtaling *v.* Marvin, 7 Barb. 412; Gleason *v.* Dodd, 4 Met. 333; Huston *v.* Cantril, 11 Leigh, 137; Farrow *v.* Wilson, L. R. 4 C. P. 744; Cleveland *v.* Williams, 29 Tex. 204; Carriger *v.* Whittington, 26 Mo. 313; Travers *v.* Crane, 15 Cal. 12. See note, 2 Kent, Comm. (12th Ed.) 646. And the authority of an agent to occupy land of his principal is revoked by the death of the principal. Lincoln *v.* Emerson, 108 Mass. 87. — ED.]

[1] Mitchell *v.* Eades, Prec. A. 125; Lepard *v.* Vernon, 2 Ves. & Beam. 51; Watson *v.* King, 4 Camp. 272; s. c. 1 Starkie, 121; Houston *v.* Robertson, 6 Taunt. 448; Hunt *v.* Rousmanier's Adm'r, 8 Wheat. 174, 201-203, 206, 207; Ante, § 477; [Lewis *v.* Kerr, 17 Iowa, 73. Where an agent of a firm, authorized to draw its moneys from the bank, and apply the same to the uses of the firm, continues to do so after the death of one of the members thereof, without knowledge on his part or on the part of the bank, of such death, he acts within the scope of his authority, and his acts bind the firm. The authority of such agent continues in qualified form after the death of one of the members of such firm. Bank of New York *v.* Vanderhorst, 32 N. Y. 553; Merry *v.* Lynch, 68 Me. 94; Wilson *v.* Edwards, 4 Foster, 517; Primm *v.* Stewart, 7 Tex. 178.]

for another person, presupposes that the party could, at the time, by his personal execution of it, have made the act valid.[1]

[1] Ante, §§ 147, 148, 264; Coombes's case, 9 Co. 76, 77; Hunt *v.* Rousmanier's Adm'r, 8 Wheat. 174, 200–205; Clarke *v.* Courtney, 5 Peters, 319, 349–351. This subject is very amply illustrated in the opinion of the Supreme Court of the United States, delivered by Mr. Chief Justice Marshall, in Hunt *v.* Rousmanier's Adm'r, 8 Wheat. 291. Among other things he says: "This instrument contains no words of conveyance, or of assignment, but is a simple power to sell and convey. As the power of one man to act for another depends on the will and license of that other, the power ceases when the will or this permission is withdrawn. The general rule, therefore, is, that a letter of attorney may, at any time, be revoked by the party who makes it, and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law. Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will, yet, if he binds himself for a consideration, in terms or by the nature of his contract, not to change his will, the law will not permit him to change it. Rousmanier, therefore, could not, during his life, by any act of his own, have revoked this letter of attorney. But does it retain its efficacy after his death? We think it does not. We think it well settled, that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death. This principle is asserted in Littleton, § 66, by Lord Coke, in his Commentary on that section (52 *b*), and in Willes's Reports (105, note, and 565). The legal reason of the rule is a plain one. It seems founded on the presumption, that the substitute acts by virtue of the authority of his principal, existing at the time the act is performed; and on the manner in which he must execute his authority, as stated in Coombes's case. In that case it was resolved, that 'When any one has authority, as attorney, to do any act, he ought to do it in his name who gave the authority.' The reason of this resolution is obvious. The title can regularly pass out of the person in whom it is vested, only by a conveyance in his own name; and this cannot be executed by another for him, when it could not, in law, be executed by himself. A conveyance in the name of a person, who was dead at the time, would be a manifest absurdity. This general doctrine, that a power must be executed in the name of the person who gives it, a doctrine founded on the nature of the transaction, is most usually engrafted in the power itself. Its usual language is, that the substitute shall do that which he is empowered to do in the name of his principal. He is put in the place and stead of his principal, and is to act in his name. This accustomed form is observed in the instrument under consideration. Hunt is constituted the attorney, and is authorized to make and execute a regular bill of sale in the name of Rousmanier. Now, as an authority must be pursued in order to make the act of the substitute the act of the principal, it is necessary that this bill of sale should be in the name of Rousmanier; and it would be a gross absurdity, that a deed should purport to be executed by him, even by attorney, after his death; for the attorney is in the place of the principal capable of doing that alone which the principal might do." Pothier puts the doctrine upon analogous reasoning, of a similar, though

§ 489. The only admitted exception in our law, if, indeed, that properly constitutes an exception, is the case where the power or authority is coupled with an interest in the thing actually vested in the agent.[1] The reason of this exception is entirely compatible with the general ground upon which the rule is founded. It is, that the agent having the legal title to the property vested in himself, is capable of transferring it in his own name, notwithstanding the death of the principal; and the death of the principal, therefore, has no operation upon his act. The power, given by the principal, is, under such circumstances, rather an assent or agreement that the agent may transfer the property vested in him, free from any equities of the principal, than strictly a power to transfer.[2]

perhaps of a less technical nature. The principal (says he) is drawn from the nature of the contract of mandate. The principal (*le mandat*), by his contract, charges the agent to do something in his place or stead; *vice versa* the agent (*le mandataire*), in executing the mandate, lends his agency (*ministre*) to the principal, who is deemed to do, by the agency of his agent, what is intended by the mandate. Now, the agent cannot any further lend his agency to a principal who is dead, and therefore he cannot further execute the mandate after the death of the principal. Pothier, de Mandat, n. 103. [Death of the employer excuses further performance of his contract to employ another as clerk in his business for a stipulated time, and his representatives are not liable to such clerk. Yerrington *v.* Greene, 7 R. I. 589; cases fully cited in the argument.]

[1] Hunt *v.* Rousmanier's Adm'r, 8 Wheat. 174, 201–206; 2 Kent, Comm. Lect. 41, pp. 645, 646 (4th ed.); Shipman *v.* Thompson, Willes, 104, note (*a*); Story on Bailm. § 209; Ante, §§ 164, 477, 478; [Hockett *v.* Jones, 70 Ind. 227].

[2] Mr. Chief Justice Marshall, in Hunt *v.* Rousmanier's Adm'r, 8 Wheat. 174, stated the grounds of this distinction very fully: "The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which in such a case is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal, acting in his own name, in pursuance of powers which limit his estate. The legal reason, which limits a power to the life of the person giving it, exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected without violating any legal principle. This idea may be in some degree illustrated by examples of cases, in which the law is clear, and which are incompatible with any other exposition of the term 'power

§ 490. The same principle applies, *a fortiori*, to the death of the agent; for it then becomes practically impossible for him to execute

coupled with an interest.' If the word 'interest,' thus used, indicated a title to the proceeds of the sale, and not a title to the thing to be sold, then a power to A., to sell for his own benefit, would be a power coupled with an interest; but a power to A., to sell for the benefit of B., would be a naked power, which could be executed only in the life of the person who gave it. Yet for this distinction no legal reason can be assigned. Nor is there any reason for it in justice; for a power to A., to sell for the benefit of B., may be as much a part of the contract, on which B. advances his money, as if the power had been made to himself. If this were the true exposition of the term, then a power to A. to sell for the use of B., inserted in a conveyance to A. of the thing to be sold, would not be a power coupled with an interest, and, consequently, could not be exercised after the death of the person making it; while a power to A., to sell and pay a debt to himself, though not accompanied with any conveyance, which might vest the title in him, would enable him to make the conveyance, and to pass a title not in him, even after the vivifying principle of the power had become extinct. But every day's experience teaches us, that the law is not as the first case put would suppose. We know, that a power to sell for the benefit of B., engrafted on an estate conveyed to A., may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person, to whom it is given, has no interest in its exercise. His power is coupled with an interest in the thing, which enables him to execute it in his own name, and is, therefore, not dependent on the life of the person who created it. The general rule, that a power of attorney, though irrevocable by the party during his life, is extinguished by his death, is not affected by the circumstance, that testamentary powers are executed after the death of the testator. The law, in allowing a testamentary disposition of property, not only permits a will to be considered as a conveyance, but gives it an operation, which is not allowed to deeds, which have their effect during the life of the person who executes them. An estate, given by will, may take effect at a future time, or on a future contingency, and in the mean time descends to the heir. The power is, necessarily, to be executed after the death of the person who makes it, and cannot exist during his life. It is the intention, that it shall be executed after his death. The conveyance, made by the person to whom it is given, takes effect by virtue of the will, and the purchaser holds his title under it. Every case of a power, given in a will, is considered in a Court of Chancery as a trust for the benefit of the person for whose use the power is made, and as a devise or bequest to that person." [A recent case furnishes an illustration of this principle. A person going abroad on account of ill health employed an agent to carry on his business, with complete possession and control of his property, with a written power to sell all or any of the furniture, stock, and property at any time in his hands, and to apply the proceeds to the security or payment of a specified note, indorsed by such agent and a third person, or of any other note given in renewal of the same, or for which the agent might become responsible. It was held, that, the possession of the property being connected with the power for the protection and indemnity of the agent, as well as for other purposes, the agent had a power, coupled with an interest, which survived after the death of the principal abroad, and

the power, either in his own name, or in the name of his principal. But a further reason exists why it should not be executed by his personal representatives; and that is, that the principal must be presumed to have placed a confidence and trust in the personal character and skill of his agent, which might not equally extend to his representatives.[1] The same reasoning will apply to the case of a substitute, who is appointed by the agent under a power of substitution. The death of the agent extinguishes the power of the substitute; for the agent is accountable to the principal for the acts of his substitute, since he is appointed by, and in place of, the agent; and the appointment is, therefore, naturally withdrawn by the death of the appointer.[2] But a distinction may well exist in this matter, where the substitute is to be treated as the sole agent of the principal; as, if the power be to the agent, and if he cannot or will not act, then that he may appoint another to act as the agent of the principal, and not as a substitute under himself.[3] For, in this latter case, the death of the agent will not revoke the appointment made by him of the sub-agent.[4]

§ 491. These doctrines are not peculiar to our law. In the Roman law the rule was fully recognized, that a mere power or

authorized the agent to sell the property for his protection and indemnity after such death. Knapp *v.* Alvord, 10 Paige, 205. And held, also, that mere advances made by a factor, whether at the time of his employment as such, or subsequently, cannot have the effect of altering the revocable nature of an authority to sell, unless such advances are accompanied by, and make the consideration for, an agreement that the authority shall not be revocable. Esteban de Comas *v.* Prost, 11 Jur. N. S. 417; Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11; Marzion *v.* Pioche, 8 Cal. 522. — R.]

[1] Pothier, de Mandat, n. 101. See Merrick's Estate, 8 Watts & Serg. 402; Gage *v.* Allison, 1 Brevard, 495; City Council *v.* Duncan, 3 Id. 386.

[2] Pothier, de Mandat, n. 105; Ante, § 469. [Where a factor who receives goods, and in his own name ships them to be sold by a sub-agent in another place, dies before he collects the proceeds from the sub-agent, his agency is thereby revoked, and the sub-agent becomes the debtor, and not the trustee, of the principal. The factor's administrator has no authority to collect the money, and if he does, he receives it only as agent for the principal. Jackson Ins. Co. *v.* Partee, 9 Heisk. 296. So, the death of an agent acting under a letter of attorney containing a power of substitution, acts as a revocation of the authority of the substituted agent, and if the latter, being in possession of the principal's certificates of loan, presents them to the officers of a company for transfer, this alone will not justify such officers in making the transfer. Lehigh Coal Co. *v.* Mohr, 83 Pa. St. 228. — Ed.]

[3] Ante, § 469.

[4] Pothier, de Mandat, n. 105; Story on Bailm. § 20; [Smith *v.* White, 5 Dana, 376].

authority expired by the death either of the principal, or of the agent. "Mandatum, re integrâ, domini morte finitur.[1] Inter casus omittendi mandati etiam mors mandatoris est; nam mandatum solvitur morte.[2] Morte quoque ejus, cui mandatum est, si is integro adhuc mandato decesserit, solvitur mandatum."[3] But there was this qualification of the doctrine in the Roman law, that, if the business was in part executed by the agent, at the time of the death of the agent (but not otherwise), the remainder might be executed by his heir, who succeeded to the authority.[4] This was expressly laid down in the case of a deceased partner, where the heir was held to be authorized to complete the execution of the inchoate act of the deceased partner. "Hæres socii, quamvis socius non est, tamen ea, quæ per defunctum inchoata sunt, per hæredem explicari debent."[5] So, the acts of the agent, done *bona fide*, in ignorance of the death of his principal, were held valid and binding upon the heirs of the latter.[6] "Si tamen per ignorantiam impletum est, competere actionem utilitatis causâ dicitur. Julianus quoque scripsit, mandatoris morte solvi mandatum, sed obligationem aliquando durare.[7] Si quis debitori suo mandaverit, ut Titio solveret, et debitor, mortuo eo, cum

[1] Cod. Lib. 4, tit. 35, l. 15; Pothier, Pand. Lib. 17, tit. 1, n. 76; Pothier de Mandat, n. 103; 1 Domat, B. 1, tit. 15, § 4, art. 6.

[2] Dig. Lib. 17, tit. 1, l. 26, Introd.; Pothier, Pand. Lib. 17, tit. 1, n. 76.

[3] Dig. Lib. 17, tit. 1, l. 27, § 3; Pothier, Pand. Lib. 17, tit. 1, n. 75.

[4] Pothier, Pand. Lib. 17, tit. 1, n. 75; Pothier, de Mandat, n. 101; 1 Domat, B. 1, tit. 15, § 4, art. 7. This distinction in the Roman law between cases, where the mandate is wholly unexecuted, and where it is partly executed, as to the validity of the subsequent acts of the agent or of his representatives, does not seem founded in any very satisfactory reasoning. Domat has stated it (1 Domat, B. 1, tit. 15, § 4, art. 7 and 8), and has added the following very sensible questions: "But, if a proxy, or other agent, were charged with an affair which could not admit of delay, such as the care of gathering in a harvest, or any other pressing and important affair, and, just as he is going to execute the order, or after he has already begun it, he learns the death of the person, from whom he received his order, and he cannot give notice of it to the heirs or executors, who happen to be absent, may not he, and even ought not he, to execute the order?" And again: "But, if the heir, or executor, of the proxy, knowing the order, that was given him, and seeing that the absent master could not look after his own affairs, and that there would be danger of some loss, if he did not take care of it; would not he be obliged to do what were in his power, such as to continue to till the land, or to gather in the harvest?" See also Story on Bailm. §§ 202, 204.

[5] Dig. Lib. 17, tit. 2, l. 40; Pothier, Pand. Lib. 17, tit. 2, n. 59; Pothier, de Mandat, n. 101; 1 Domat, B. 1, tit. 15, § 4, art. 7, 8.

[6] 1 Domat, B. 1, tit. 15, § 4, art. 7, 8.

[7] Dig. Lib. 17, tit. 1, l. 26, Introd.; Pothier, Pand. Lib. 17, tit. 1. n. 77.

id ignoraret, solverit, liberari eum oportet."[1] Hence Paulus declared: "Mandatum morte mandatoris, non etiam mandati actio solvitur."[2] *A fortiori*, the same rule was applied, where the authority was not to be executed until after the death of the principal.[3] "Idem est, et si mandavi tibi, ut post mortem meam hæredibus meis emeres fundum."[4]

§ 492. From the Roman law, similar principles have been imported into the commercial jurisprudence of the modern nations of continental Europe. Pothier says: "The mandate is extinguished by the natural or civil death of the principal (or mandant), when it happens, before the agent (or mandatary) has executed it. For example, if I have authorized you to purchase a certain thing for me, the power, which I have given you, ceases with my death, and my heirs are not obliged to take, on their own account, the purchase made by you after my death."[5] "But," he adds, "although the mandate is thus extinguished by the death of the principal, nevertheless, if the agent, being ignorant of the death of the principal, has in good faith transacted the business, with which he was charged, the heirs and other representatives of the principal are bound to indemnify him, and to ratify what he has done."[6] Again, he says: "Nevertheless, there are cases, in which the agent, although he has knowledge of the death of his principal, not only may, but ought to, act in the business intrusted to him. As, for example, if one is charged with gathering the vintage of another, and hears of the death of his principal at the very time, when the

[1] Dig. Lib. 17, tit. 1, l. 26, § 1; Pothier, Pand. Lib. 17, tit. 1, n. 77; Pothier, de Mandat, n. 106.

[2] Dig. Lib. 17, tit. 1, l. 58, Introd.; Pothier, Pand. Lib. 17, tit. 1, n. 77; Dig. Lib. 46, tit. 3, l. 32.

[3] Dig. Lib. 17, tit. 1, l. 12, § 17; Id. l. 13; Pothier, Pand. Lib. 17, tit. 1, n. 78.

[4] Dig. Lib. 17, tit. 1, l. 13; Pothier, Pand. Lib. 17, tit. 1, n. 78. The same doctrine is still more succinctly expressed in the Institutes. "Item, si adhuc integro mandato, mors alterutrius interveniat, id est, vel ejus, qui mandaverit, vel illius, qui mandatum susceperit, solvitur mandatum. Sed utilitatis causâ receptum est, si eo mortuo, qui tibi mandaverat, tu, ignorans eum decessisse, executus fueris mandatum, posse te agere mandati actione; alioqui justa et probabilis ignorantia tibi damnum adferret. Et huic simile est, quod placuit, si debitores, manumisso dispensatore Titii, per ignorantiam liberto solverint, liberari eos; cum alioqui strictâ juris ratione, non possent liberari; quia alii solvissent, quam cui solvere debuerint." Inst. Lib. 3, tit. 27, § 10.

[5] Pothier, de Mandat, n. 103.

[6] Pothier, de Mandat. n. 106; Pothier on Oblig. by Evans, n. 81, 448, 475; Id. French ed. n. 81, 449, 511.

vintage cannot properly be deferred, as the grapes of the country are then fit to be gathered, and there is not time to advise his heirs thereof, who live at a distance, there it will be the duty of the agent to gather the vintage, notwithstanding such death."[1] So, if the act, required to be done, is to be done after the death of the principal, the same rule will apply.[2]

§ 493. Pothier adds another most important exception to the rule, as applicable to the business of commerce. Although (says he), regularly, every mandate ends with the death of the person giving it, yet it has, for the benefit of commerce, been established, that the commission of these agents (or mandataries) shall last even after the death of the merchant, who appointed them, until it is revoked by the heir, or other successor. And, in contracting for the business, to which they are appointed, they bind the heir of the merchant who appointed them, or the vacant possession if he has left no heir.[3]

[1] Pothier, de Mandat, n. 107.

[2] Pothier, de Mandat, n. 108.

[3] Pothier on Oblig. by Evans, n. 448; Id. n. 80, 475; Id. French ed. n. 81, 449, 511; Pothier, de Mandat, n. 109. See also Emerig. sur Assur. Tom. 2, p.120. Other illustrations will be found in Mr. Cushing's very valuable translation of Pothier on the Contract of Sale, n. 32. Pothier there says: "In this contract, as in others, the consent of the parties may be manifested, not only between those who are present together, but also between those who are at a distance from each other, by means of letters, or through the intervention of an agent *per epistolam, aut per nuntium*. In order that the consent of the parties may take place in the last-mentioned case, it is necessary, that the will of the party, who makes a proposition in writing, should continue until his letter reaches the other party, and until the other party declares his acceptance of the proposition. This will is presumed to continue, if nothing appears to the contrary. But, if I write a letter to a merchant living at a distance, and therein propose to him to sell me a certain quantity of merchandise, for a certain price; and, before my letter has time to reach him, I write a second, informing him, that I no longer wish to make the bargain; or if I die, or lose the use of my reason; although the merchant, on the receipt of my letter, being in ignorance of my change of will, or of my death, or insanity, makes answer that he accepts the proposed bargain; yet there will be no contract of sale between us; for, as my will does not continue until his receipt of my letter, and his acceptance of the proposition contained in it, there is not that consent or concurrence of our wills, which is necessary to constitute the contract of sale. This is the opinion of Bartholus, and the other jurists, cited by Bruneman, ad. l. 1, § 2, D. de contrah. empt. (Dig. Lib. 18, tit. 1, b. 1, § 2), who very properly rejected the contrary opinion of the Gloss, *ad dictam legem*. It must be observed, however, that if my letter causes the merchant to be at any expense, in proceeding to execute the contract proposed; or, if it occasions him any loss, as, for example, if, in the intermediate time between the receipt of my first and that of my second

§ 494. Similar principles will be found adopted into the jurisprudence of Scotland. Thus, it is laid down by Erskine, in his Institutes, that mandates expire by the death of the mandant (the principal), both because it is presumed that the commission was accepted from a personal regard to him, and because the will of the mandant, which alone supports the commission, ceases necessarily upon his death. They expire by the death of the mandatary (the agent), because the commission was given from the mandant's special confidence in him.[1] But (he adds), if a mandatary, ignorant of the mandant's death, continue to execute the commission *bona fide*, what he doth under that *ignorantia facti* must be ratified by the mandant's heir; for, till the mandatary knew of his employer's death, it was his duty to go on in the management. But if the mandatary, ignorant perhaps that mandates are vacated by the death of the mandant, shall, after his knowledge of it, proceed to execute a commission which he had accepted at the desire of the deceased, what he does cannot affect the mandant's heir; for ignorance of law can give no man a right to manage the affairs of another, who had given him no commission. Yet this is to be understood, *rebus integris*. For if part of the commission had been executed before the mandant's death, by which the management would suffer if the whole were not to be carried into immediate execution, the powers given

letter, the price of that particular kind of merchandise falls, and my first letter deprives him of an opportunity to sell it before the fall of the price, in all these cases, I am bound to indemnify him, unless I prefer to agree to the bargain, as proposed by my first letter. This obligation results from that rule of equity, that no person should suffer from the act of another: Nemo ex alterius facto prægravari debet. I ought, therefore, to indemnify him for the expense and loss, which I occasion him by making a proposition which I afterwards refuse to execute. For the same reason, if the merchant, on the receipt of my first letter, and before receiving the second, which contains a revocation of it, or, being in ignorance of my insanity or death, which prevents the conclusion of the bargain, charges to my account and forwards the merchandise; though, in that case, there cannot properly be a contract of sale between us, yet he will have a right to compel me or my heirs to execute the proposed contract, not in virtue of any contract of sale, but of my obligation to indemnify him, which results from the rule of equity above mentioned." The decision of the Supreme Court of Massachusetts, in McCulloch *v.* The Eagle Insurance Co. 1 Pick. 278, is in conformity to this general doctrine. But the English decisions are to the contrary, holding that the offer by the mail is a continuing offer up to the time when the other party assents thereto, and then becomes obligatory on both parties. Adams *v.* Lindsell, 1 B. & Ald. 681; Long on Sales, by Rand (1839), pp. 182, 183. See also Pothier de Change, n. 179.

[1] Ersk. Inst. B. 3, tit. 3, § 40; 2 Bell, Comm. § 413 (4th ed.); Id. pp. 488–490 (5th ed.).

by the mandate are not accounted to have expired, and the mandatary not only may, but ought to, continue his management.[1] In the same manner, if the mandatary should die after having begun a course of management, which required to be carried on without delay, his heir may execute what was left unfinished by his ancestor.[2]

§ 495. Reasonable as these doctrines seem, and convenient as they must be admitted to be for the practical purposes of trade and commerce, it has been thought that they do not prevail in the common law as recognized either in England or in America.[3] But it

[1] Ante, §§ 465, 466, 483.

[2] Ersk. Inst. B. 3, tit. 3, § 41; 2 Bell, Comm. § 413 (4th ed.); Id. pp. 488–490 (5th ed.).

[3] 2 Comm. Lect. 41, p. 646 (4th ed.). See also Story on Bailm. §§ 204, 205; Ante, §§ 465, 466, 483. Mr. Thompson, on the subject of the limitation of the agency, says: "Mandates terminate, in general, by the death of the mandant or mandatary; by the insanity of the latter; by revocation; by renunciation; or by the sequestration of the mandant, which vests his estate, and all the rights connected with it, in his creditors. The mandatary's bankruptcy does not appear to be inconsistent with the continuance of his mandate. But the rights of third parties are differently affected by its termination, from the cause now stated, according as they have, or have not, been led to believe in its continuance. Any person allowing another to exercise a general management of his affairs, whether by express or tacit mandate, contracts thereby an implied obligation to the public, that the mandate shall be held *quoad* him as continued, until its termination becomes notorious, or has been made known to the party contracting. In this view, as the mandant's death and bankruptcy are notorious events, the presumption is, that every person is aware of them; and, therefore, contracts made subsequently with the mandatary, or acts performed by him, will not be valid, unless it is proved by the parties making them that these events were unknown to the mandatary or the contracting party, and could not have been known by ordinary diligence. Further, if a factor has advanced money before his constituent's death or bankruptcy, on the faith of goods consigned to him, he will be entitled, even after these events, to sell the goods for his indemnification. Such advances change the contract from mandate to loan and security. But, on the principles which have been now mentioned, there is no ground to presume that the revocation or renunciation of a general mandate (neither of them being notorious) are known to third parties; and, therefore, the contracts of such parties with a general agent will be effectual, unless it is proved that they knew, or ought to have known, of the renunciation or recall. For instance, a servant, who had power to draw bills in his master's name, may bind him by bills so drawn after his dismissal, if the party taking them had not time to know of it. The kind of intimation which is necessary to exclude this risk, shall be afterwards considered with reference to the dissolution of partnership. In the event of the mandant's supervening insanity, which is not in itself notorious, it seems to follow, from the mandant's implied contract with the public, that transactions, made even after it, with the mandatary, shall stand, unless with reference to parties who knew of the insanity. Such parties cannot be said to be *bona fide* to contract;

may be doubted whether our law deserves such a reproach, at least to the full extent in which it is usually imputed to it. Regularly indeed where the act to be done must be done in the name of the principal, and not in that of the agent, the authority is extinguished by the death of the principal, because it has then become incapable of being so executed.[1] And it should seem that this would be equally true in the Roman law, and in the jurisprudence of continental Europe, under the like circumstances. The difference on this subject between our law and the latter seems to rest, not so much upon a difference of principle, as upon the difference in the modes of executing the authority. Under the Roman law, the agent ordinarily executed his authority in his own name, and thereby bound his principal, indirectly, by his contract, *ex mandato*, and himself personally.[2] An execution of the authority in the name of his principal was not generally allowed or required. In the jurisprudence of modern continental Europe, the rule of the Roman law would seem still to exist, so far that the agent may bind the principal by the act done in his (the agent's) own name, *ex mandato;* although he is also at liberty to do the act in the name of his principal, in which latter case he may escape from any personal responsibility.[3] This is certainly the doctrine in Scotland.[4] Where the act, notwithstanding the

or rather, it may be held, that with regard to them (as they cannot plead want of notice) the mandant's known insanity annulled the mandatary's powers. The same rule, under the same limitations, appears to hold with regard to all mandates, which, however limited in their terms, are acted on before the public as general mandates, the public being entitled to rely on them as general mandates till their termination is made known. It has been said that limited mandates (which expire, in general, from the causes already mentioned, or by performance of the business for which they were granted) 'are not, like general powers, capable of extension by mere inference and *bona fides*.' But the mandant, by suffering such a mandatary to act, enters into the same implied contract with the public as in a general mandate: namely, that the mandate shall continue till its termination is made known; and, therefore, though it be recalled, or have ceased, all facts falling within the scope of it will be good, as to third parties, unless its revocation is notorious, or has been intimated to them. The case of a limited partnership, to be afterwards noticed, which entitles third parties, after its dissolution, to rely on contracts within the scope of it, made by any one partner in the company's name, before the dissolution is made known to them, affords an illustration of this principle." Thomson on Bills, pp. 224–227 (2d ed. 1836); [Kiddell *v.* Farnell, 26 L. J. Ch. 818].

[1] Ante, §§ 147, 148, 488.

[2] Ante, §§ 163, 271; 1 Stair, Inst. B. 1, tit. 12, § 16.

[3] Ante, § 163, and note, 265 *a;* Pothier on Oblig. n. 82; Smout *v.* Ilberry, 10 Mees. & Wels. 1.

[4] 1 Stair, Inst. B. 1, tit. 12, § 16.

death of the principal, can and may be done in the name of the agent, there seems to be a sound reason why his death should not be deemed to be a positive revocation under all circumstances, and that a subsequent execution of it may be valid.[1] But where the act

[1] [And this principle has recently been adopted in American law. Thus, where A. had, by letter, requested and authorized B. to make sale of a tract of wild land for him, and B., in accordance with the request and authority as expressed by the letter, made a contract of sale and received part of the purchase-money, and gave possession of the land to C. for A., in accordance with the contract, shortly after the death of A., but without knowledge of that event, and C. afterward paid the residue of the purchase-money due on the contract to the guardian of the heirs of A. on demand thereof; and afterward the heirs having brought an action to recover possession of said lands, and C. having thereupon commenced suit against them to enjoin their proceeding in such action, it was held that the transaction being a matter *in pais*, and not by deed or necessary to be done in the name of the principal, and being in good faith on the part of B. and C., and within the apparent authority of B. as so expressed by A., without knowledge of his death, the heirs and representatives of A. are estopped to deny such apparent authority of B., and the contract is obligatory on them. Ish *v.* Crane, 8 Ohio St. 520; s. c. 13 Ohio St. 574, 596, 611. Sutliff, J., in an able judgment there said: "As a general rule, it is well understood that the authority of the agent, depending upon the power he possesses to represent his principal, must be regarded as terminated upon the termination of his power; and that the death of the principal terminates the power of the agent. The death of the principal is said to be a revocation, by operation of law, of the power of the agent to act as an agent. And it is insisted (and there are some authorities to that effect) that a revocation of the authority of the agent, by the death of the principal, necessarily leaves *all* acts of the agent done thereafter, in no respect binding upon the estate or representatives of the principal.

"I apprehend, however, that the weight of authorities upon this subject will be found to go no further than to hold absolutely void acts of the agent, after the death of his principal and without notice, which must *necessarily be done in the name of the principal.*

"One of the oldest and leading authorities referred to in support of the general proposition that all acts of the agent, not coupled with an interest, after the death of the principal, are absolutely void, is Littleton. But upon referring to that authority, it is found to be merely this: 'If a man maketh a deed of feoffment to another, and a letter of attorney to one to deliver to him seizin by force of the same deed; yet if livery of seizin be not executed in the life of him which made the deed, this availeth nothing, for that the other had nought to have the tenements according to the purport of the said deed before livery of seizin made; and if there be no livery of seizin, then, after the decease of him who made the deed, the right of these tenements is forthwith in his heire, or in some other.' Coke on Litt. § 66.

"Sir Edward Coke, in his commentary on this section, remarks: 'Here albeit the warrant of attorney be indefinite without limitation of any time, yet the law prescribeth a time, as Littleton here saith, in the life of him that made the deed; but the death not only of the feoffor, of whom Littleton speaketh, but of the feoffee also, is a countermand in law of the letter of attorney, and

is required to be done in the name of the principal, the same objection would seem to lie to it in the foreign law as does lie in our law.

the deed itself is become of none effect, *because, in this case, nothing doth passe before livery of seizin.* For if the feoffor dieth, the land descends to his heire; and if the feoffee dieth, livery cannot be made to his heire, because, then he should take by purchase, where heires were named by way of limitation. And herewith agreeth Bracton. "Item oportet quod donationem sequatur rei traditio, etiam in vita donatoris et donatorii." Therefore, a letter of attorney to deliver livery of seizin after the decease of the feoffor, is void.'

"The same doctrine has been applied in the case of fines and common recoveries, in which it has uniformly been held, where an appearance has been entered and a judgment suffered under and by virtue of a warrant of attorney after the death of the vouchee, that, upon the death of the vouchee, the warrant of attorney became void, and the judgment thereon of no effect. Wynne *v.* Wynne, 7 Mod. Rep. 503, and Will. Rep. 563, where the same case is reported. The action was one of common recovery. The recovery was of Easter term, 1740. The writ of entry tested the 2d of April, returnable (*quind. pasch.*) the 20th April, fixing the appearance day the 23d, on which day the record showed that the defendant, William Thomas, the tenant, appeared and vouched J. Apperley and Alathea, his wife, whereupon a writ of summons and *warrantirandum* was awarded, returnable on the morrow of *Ascension* (May 16th) of that year. The dedimus to take the warrant of attorney was tested the 25th April. The warrant of attorney was executed by J. Apperley and wife, on the 30th, and the mittimus by which it was sent out of chancery into that court (the Common Pleas) was tested the 8th of May. *Alathea* died on the 10th of May. It was held, that the warrant of attorney by *Alathea*, so executed, was revoked by her death, and did not authorize the attorney to enter an appearance on the 16th (after her death), nor authorize a judgment of recovery.

"It will readily occur to any one, that in relation to the conveyance of the *title* of land, either by the execution of a deed of conveyance, or by suffering a common recovery, the power of the agent must necessarily terminate on the death of the principal. Even a deed signed and sealed by one, with the intent and wish to deliver the same, would, from the necessity of the case, be inoperative to convey a title by delivery after the death of the maker of the deed. The title of the land passing, upon his death, *instanter*, to the heir or devisee of the deceased, no action of the attorney, even if his powers continued, could affect the title. His action would have the same relation to the title as it would, the principal living, and having before conveyed the title to a stranger, if the attorney, in ignorance of the fact, by virtue of his power of attorney, should afterwards execute a deed of conveyance of the same land to another.

"But there is no *necessity* of *this kind* for holding the authority of the agent to make contracts within his agency *terminate instanter* upon the death of the principal.

"The termination of the authority of the agent by virtue of his agency, upon the death of the principal, seems rather to rest upon the general rule of law, that the derivative authority expires with the original authority from which derived.

"It is said, as a reason for the termination of the power of the agent upon

§ 496. Now, our law recognizes this very distinction in its fullest force. In the case of an authority coupled with a vested interest

the expiration of the power of the principal, that it is impossible that the power of the agent, who is only to act for or in the stead of the principal, as his representative, can in fact be greater or continue longer than the power of the principal. But the power of the principal may be terminated by bankruptcy or lunacy, and, in the case of a *feme sole*, by coverture. In each of those cases, a revocation of the agency by operation of law, by change of condition or state of the principal, producing in him an incapacity *to act legally*, obtains under the general rule, as well as in the case of revocation by the death of the principal. The general rule, that such change of state, terminating the power of the principal to act, is a revocation of the agency by operation of law, obtains in each of the cases named. And the question arises in each, whether there is in fact any exception to the application of the general rule. Is coverture, bankruptcy, lunacy, or death, terminating, as they respectively do, the power of the principal, to be regarded as so terminating the authority of the agent, that his acts are necessarily to be regarded in all cases as void, and of no binding effect upon the representatives or estate of the principal?

"The general rule that a mere power or authority expires by the death of either the principal or agent, is recognized in the civil law, as well as at common law. Yet under the civil law it has always been held that the acts of an agent done in good faith in discharge of the duties of the agency, after the death of the principal, and in ignorance of the event on the part of those concerned in the transaction, were valid and binding upon the representatives of the principal. 1 Dom. B. 1, tit. 15, § 4, art. 7, 8.

"Pothier, in treating upon this subject, says: 'The mandate is extinguished by the natural or civil death of the principal (or mandant) when it happens before the agent (or mandatary) has executed it. For example, if I have authorized you to purchase a certain thing for me, the power which I have given you, ceases with my death, and my heirs are not obliged to take, on their own account, the purchase made by you after my death.' 'But,' he adds, 'although the mandate is thus extinguished by the death of the principal, nevertheless, if the agent, being ignorant of the death of the principal, has in good faith transacted the business with which he was charged, the heirs and other representatives of the principal are bound to indemnify him, and to ratify what he has done.'

"But while it is conceded that in Scotland, and in all other countries where the principles of the civil law obtain, this rule is recognized, that the acts of an agent, done *bona fide*, after the death of the principal, but without notice of his death, are valid and binding, it is insisted that the same rule does not find favor at common law.

"Chancellor Kent, in his Commentaries, vol. ii. page 646, in treating upon this subject, uses the following language: 'By the civil law, and the law of those countries which have adopted the civil law, the acts of an agent done *bona fide* after the death of the principal, and before notice of his death, are valid and binding on his representatives. But this equitable principle does not prevail in the English law; and the death of the principal is an instantaneous, an absolute revocation of the authority of the agent, unless the power be coupled with an interest.'

"The great learning and deservedly high reputation of the author, have

in the thing, we have already seen, that it is not extinguished by the death of the principal, for the very reason, that it can still be exe-

doubtless tended to give more confidence to the doctrine thus unqualifiedly expressed, than the authorities to which he refers for its support would seem to warrant. The first authority referred to by Mr. Kent is the case of The King *v.* Corporation of Bedford Level, 6 East, 356. It will be perceived, however, upon reference to the authority, that the question was only incidentally presented in that case. The question arose as to the validity of the act of a *deputy registrar* after the death of the principal registrar. The Solicitor-General Wilson, and Abbott, in their argument upon this point, used the following language: 'He is a mere ministerial officer, having no discretion to exercise; this is most like the case of a steward of a manor who may take surrenders and do other ministerial acts, though not legally invested with the office; because, as it is said in Knowles *v.* Luce, Moor, 112, those for whom such acts are done know not the extent of his title. And there Manwood, C. B., who delivered the judgment of the court, compares it to the case of an under-steward when the head steward is dead, whom he considers to have a color of authority; so that if he assemble the tenants and they do their service at the court, the acts which he does are good. And he distinguishes that from the case of an officer who acts without either color or right.' Lord Ellenborough, in delivering his opinion in the case, held that the appointment of the deputy registrar must be regarded as made by the principal registrar Cole, and added: 'If, then, he were to be considered as the deputy of *Cole*, his authority would necessarily expire on the death of his principal. I feel myself pressed, however, with the authority of the doctrine in the case of Moor, that the acts of an under-steward may be good after the death of his principal; and it is a very important point to be considered how far that may be carried.' Lawrence, J., and Le Blanc, J., respectively expressed similar opinions upon the same question.

"Lord Ellenborough, C. J., on the next day delivered the opinion of the whole court. In the opinion he uses the following language: 'The case pressed upon us from Moor, 112, on being considered, is not, we think, an authority against this opinion, where Manwood, C. B., says, "there is a diversity between copyhold grants by a steward who has a color and no right to hold a court, and one who has neither color or right; for if one who has color assemble the tenants, and they do their service, the acts are good which he does, *as the under-steward when the head steward is dead.*" "But this must be understood of acts of the under-steward after the death of his principal, *and before his death is known;* for if that were known to the tenants, what color could he have to act?"'

"The case of Shipman *v.* Thompson, Will. 103, n., is referred to by Mr. Kent as another authority in point. That case was as follows: An action of assumpsit was brought by an executor, in his own name, against an attorney constituted by the testator to collect money for him of his tenants, to recover money which the attorney had collected from the tenants, as such attorney, after the death of the testator, the principal. The main question seems to have been, whether the action for money had and received could be maintained against the attorney in the name of the executor. The following is the language of that part of the opinion of Mr. B. Fortescue, before whom the cause was tried, which seems in point: 'It is quite a new debt, created by the defendant to the executor since the death of the testator, and a new cause of action which was not subsisting before. The defendant was never indebted to the

cuted in the name of the agent, he having the vested legal or equitable title in the thing, which he can transfer or change by his testator for this money, and the original debtors, the tenants, are discharged.'

"The case of Watson, &c. *v.* King, 4 Camp. N. P. 272, another case referred to by the commentator, presented the question incidentally, as follows: Maxwell, the intestate, being the owner of three-fourths part of the ship 'Little William,' in April, 1813, gave a power of attorney to one Ward, to whom he was largely indebted, authorizing him to sell them. He then sailed in the ship 'Effort' for Bermuda. In February, 1814, he was with this ship at Jamaica, and sailed in her for England with a large fleet, under convoy of H. M. ship 'Valiant.' A hurricane soon after arose, in which several of the fleet foundered. The 'Effort' parted company on the 7th of March, and was never more heard of. On the 8th of June following, Ward, under the power of attorney, sold Maxwell's interest in the '*Little William*' to the defendant, and indorsed the register in *Maxwell's name*. The suit brought by Watson and his wife, described in the declaration as administratrix of Maxwell, was an action of trover, to recover of King the three-fourths of the ship held by him under said purchase. Among other objections to a recovery, it was urged that the power of attorney, being coupled with an interest, was not revoked by the death of the intestate. Lord Ellenborough delivered the opinion of the court, and is reported to have decided this point as follows: 'A power coupled with an interest cannot be revoked by the person granting it; but it is necessarily revoked by his death. How can a valid act be done in the name of a dead man?' The opinion was delivered by Lord Ellenborough in 1815, ten years after the opinion he delivered in the case of The King *v.* The Corporation of Bedford Level, in 6 East, above referred to; and *without any qualification of his former opinion*. The question as to whether the title of Maxwell had been transferred by *his name*, after his death, being indorsed upon the register, is obviously quite a different one from the one under consideration here.

"The case of Bergen & Bergen *v.* Bennett, also cited by Mr. Kent (1 Caines' Cases, 1), was simply this: On the 12th April, 1776, Bennett executed to Vanderbilt a bond for £600, payable in one year, and for further security gave a mortgage on sixty-seven acres of land. Shortly after this, on the 8th of November, 1776, the mortgagor died intestate, leaving the respondent, Wilhelmus Bennett, fifteen years of age, his eldest son and heir-at-law. The usual power to sell was contained in the mortgage, which, *together with the power*, was, on the 10th of April, 1777, registered in the office of the county clerk, *in the book* for registering mortgages. In the registry the mortgage was, as usual, abbreviated; but the power was, though *not recorded as deeds usually are*, set forth in the registry of the mortgage in *hæc verba*, excepting as to the latter part declaring the sale to be a perpetual bar, &c., which was totally omitted. On the 13th of April, 1781, Tennis Bergen, the appellant, purchased the bond and mortgage for £700. In 1783, the respondent, the heir of the mortgagor, left the state, and went to Nova Scotia. On the 11th of March, 1804, notice of sale of the premises, at public vendue, was published by Tennis Bergen. Upon the day fixed by the notice, the premises were offered and sold at public vendue to Michael Bergen, the other appellant, for $700. The sale appeared to have been fairly made. In 1788, the respondent came back to that state, and on the 3d of February, 1800, filed his bill to redeem the premises, for the reason, among others, 'because the power to sell, contained in the mortgage, expired

own act as owner.[1] 'And it seems reasonable to believe, that the same doctrine will be fully recognized in our law, in all other cases

with the life of the donor.' The opinion was delivered by Kent, J., reversing the decree of the Court of Chancery, permitting the heir to redeem; and upon the point raised he used the following language: 'I conclude, therefore, that the power to sell was not revoked by the death of the mortgagor, and that the decree cannot be supported on the ground that was taken in the court below.'

"The case of Harper *v.* Little, 2 Greenl. 14, also referred to by the commentator, only decides the familiar principle of law, that a deed, made after the death of the principal, in his name, under a power of attorney executed by him when living, is inoperative to convey the title of lands. Another case referred to by Mr. Kent is that of Hunt *v.* Administrator of Rousmanier, 2 Mason, 244. Hunt filed his petition in equity charging that Rousmanier, in his lifetime, borrowed of him, Hunt, $1,450, January 11, 1820, and gave a bill of sale of his interest in the brig 'Marcus,' then at sea, for collateral security for the payment of the loan; and on the 13th day of the same month executed a power of attorney authorizing the plaintiff to execute a bill of sale of his interest, three-fourths of the brig, to himself or any other person he should think proper, &c., reciting in a proviso that the same was given for collateral security for the payment of the note of $1,450, payable in ninety days, &c.; and that the intestate, on the 6th of May, 1820, died; that the defendants, administrators of the intestate, had refused to pay, and he had therefore advertised the three-fourths of the brig for sale, by virtue of the power aforesaid, for the payment of said demand, but that the administrators forbade the sale, and refused to suffer the plaintiff to avail himself of his said security, &c. Upon hearing the case on demurrer, the following points were held by the court: 1. That a power coupled with an interest does not expire on the death of the person creating it; 2. A naked power does not necessarily expire with the death of the person creating it. And upon this point the following language is used by Judge Story in giving the opinion: 'When, therefore, it is said that a naked power is extinguished by the death of the person creating it, the language is meant to be confined to those cases in which, as in the case now before the court, the power is to be executed in the name and as the act of the grantor, and not of the grantee.' The same case afterwards came before the Supreme Court (8 Wheat. 201), and was in that court decided upon the same ground. Chief Justice Marshall, in pronouncing the opinion, resolves the case under the general rule that the death of the principal was a revocation of the letter of attorney; and as the sale was to be made in the *name* of the principal, *and after his death was known*, no power to sell was held by the holder of the letter of attorney.

"I have thus particularly referred to each of the authorities given by Mr. Kent in support of the doctrine expressed by him upon this subject.

"Mr. Justice Story, in treating of the subject, is much more guarded and less positive as to the doctrine of the common law differing from the civil law.

"After mentioning the rule prevailing in Scotland, and recognized in all countries where the civil law prevails, that if the agent, being ignorant of the death of his principal, has, in good faith, transacted the business with which intrusted, his acts are to be held valid, he adds: 'Reasonable as these doctrines seem, and convenient as they must be admitted to be, for the practical purposes of trade and commerce, it has been thought that they do not prevail

[1] Ante, §§ 488, 489.

of authority, where the act to be done may lawfully be done in the sole name of the agent. Thus, for example, a factor, as special

in the common law as recognized either in England or in America.' And here reference is made by Mr. Story to the opinion of Mr. Kent already referred to. 'But,' continues Mr. Story, 'it may be doubted whether our law deserves such a reproach, at least to the full extent in which it is usually imputed to it. Regularly, indeed, where the act to be done must be done in the name of the principal, and not in that of the agent, the authority is extinguished by the death of the principal, because it has then become incapable of being so executed.' Story on Agency, § 495. Mr. Story did not insist upon any exception or limitation of the rule in relation to the revocation of the authority of the agent by the death of the principal, inconsistent with the doctrine expressed by Littleton and Coke, already referred to. In §§ 147, 148, and 150, of his work upon Agency, Mr. Story concedes that the death of the principal necessarily extinguishes the power of an agent to make a *conveyance under seal in the name* of his principal, or to execute a bond or any sealed instrument, *in the name* of the principal, after his death, that can be obligatory upon his representatives. He, however, uses the following language in § 152: 'But when an act is to be done *in pais*, or in any other manner than by a written instrument *under seal*, then the act will be so construed, if it may be, as most effectually to accomplish the end required by the principal.' And the same doctrine is, with equal clearness, expressed in the opinion of the court in the case of Hunt *v.* Rousmanier, 2 Mason, 244.

"To show the distinction thus made between acts of an agent by *deed*, and necessarily to be done in the name of the principal, and acts done *in pais*, and not necessarily to be done in his name, let us suppose the principal to have appointed two agents to transact business for him at a remote distance. One is employed and empowered to sell, survey, and give possession of his land, and to receive payment and receipt therefor. The other agent is authorized to execute deeds of conveyance of the land respectively to purchasers, upon presentation of receipts of payment, respectively, from the other agent, upon their contracts of sale. The limitation or exception to the rule recognized by Mr. Story would hold the acts of the agent, in selling, giving possession, and receiving and receipting the purchase price of the lands, to be valid, even if done after the death of the principal, if done in good faith and in ignorance of the event. The limitation of the rule would hold those acts valid and binding upon the representatives and estate of the principal as *acts in pais;* while it would still regard the acts of the *other agent*, in executing and delivering deeds *in the name* of the principal, as *void ex necessitate*, and utterly inoperative to *convey title after* the death of the principal. And the fact of the title of land, by an arbitrary rule of law, passing *instanter* upon the death of the owner, by descent or devise, shows the necessity of the termination of the powers of the attorney and agent for the execution of the deeds, upon the death of the principal.

"At the times that Mr. Kent and Mr. Story respectively expressed their views upon this subject, the revocation of the authority of the agent by death, I am not aware of the existence of a single well-considered adjudicated case upon the point, either in this country or England.

"It seems to have been upon the analogies of the law, as these eminent jurists respectively viewed them, that each formed his opinion.

"I admit that since the time that Mr. Kent expressed his opinion, there

owner of the goods, may, and indeed usually does, sell them in his own name.[1] So, a supercargo generally buys and sells in his own

have been cases adjudicated both in this country and in England far more in accordance with the doctrine he asserted than the cases he referred to; and which certainly seem to rather support Mr. Story's views than his own. In the case of Rigs, Aertson & Son *v.* Cage, Adm'r, 2 Humph. 350, decided in 1840, the Supreme Court of Tennessee refer to and fully recognize the doctrine of Mr. Kent, as expressed in his Commentaries, vol. ii. p. 645. But it does not appear from the report of the case that the correctness of the doctrine as laid down by Mr. Kent, was questioned by either counsel or court. Judge Green, who delivered the opinion in that case, perhaps may be said to have recognized the same view of the law, incidentally, at the preceding term of that court, in the case of Jenkins *v.* Atkins, 1 Humph. 294. In the case of Gale *v.* Tappan, 12 N. H. 146, in which it was held that a demand made by an attorney, appointed by the payee in his lifetime, after his death, was without authority, the court say generally, 'that an authority of this kind is determined by the death of the principal.' But in that case it does not appear that the demand was made in *ignorance* of the death of the principal, or that it was not a case properly to be resolved under the general rule. The doctrine, as laid down by Mr. Kent, seems to have been fully recognized by the King's Bench in the case of Blades *v.* Free, executor of Clark, 9 B. & Cressw. 167. But the limitation or exception to the general rule, here under consideration, does not appear from the report to have been argued by counsel, or particularly considered by the court, but seems to have been passed, *sub silentio*, as it was by the Supreme Court of Tennessee.

"I know of no other adjudicated case directly in point denying the limitation or exception to the rule existing at common law, as well as under the civil law. Nor are there perhaps a greater number of adjudicated cases to be found directly in point to maintain the converse of the proposition. But in this dearth of authorities, I think the weight of authority, English and American, is in favor of the existence of the limitation or exception to the rule at common law, as well as under the civil law. And the argument arising from the analogies of the law, I regard as very decidedly in favor of the exception and limitation of the rule being recognized.

"The authority of the agent, arising as it does from the relation of the agent to his principal, would seem *logically* to depend necessarily upon the continuance of that relation. But such *in law* is not the fact. It is admitted that one having been an agent, may, after he has ceased to be such, still have power to bind his principal by his acts. The only real question in dispute between those affirming and denying the limitation or exception under consideration, is, as to the *extent* of the power of one having ceased to be an agent in fact, to execute the office of agent.

"Let us briefly advert to the authorities upon this point, which are undisputed: —

"Harrison's case, as called, 12 Mod. 346, is reported thus: 'A servant had power to draw bills of exchange in his master's name, and afterward is turned out of service.' 'Holt, Chief Justice: If he draw a bill in so little time after, that the world cannot take notice of his being out of service, or if he were a

[1] Ante, §§ 33, 34, 161.

name. So, the master of a ship, in the usual course of exercising his authority, contracts in his own name, as *Dominus navis*.[1] Thus,

long time out of service, but that kept so secret that the world cannot take notice of it, the bill in those cases shall bind the master.'

"Howard *v.* Treadwell, 1 Strange, 506, a leading case, was as follows: The defendant, who was a considerable dealer in iron, and known to the plaintiff as such, though they had never dealt together before, sent a waterman to the plaintiff for iron on trust, and paid for it afterwards. He sent the same waterman a second time with ready money, who received the goods, but did not pay for them; and the Chief Justice ruled the sending him upon trust the first time and paying for the goods, was giving him credit so as to charge the defendant upon the second contract.

"In treating of when a revocation of the power of the agent by his principal takes effect, Mr. Story says: 'As to the agent himself, subject to what has already been stated, it takes effect from the time when the revocation is made known to him; and as to third persons, when it is made known to them, and not before. Until, therefore, the revocation is so made known, it is inoperative. If known to the agent, as against his principal, his rights are gone; but as to third persons, who are ignorant of the revocation, his acts bind both himself and principal. Thus where an agency, constituted by writing, was revoked, but the written authority was left in the hands of the agent, and he subsequently exhibited it to a third person who dealt with him as agent on the faith of it, without any notice of the revocation, the act of the agent, within the scope of the authority, was held to bind the principal. Hence it is, that if a clerk or agent is employed to sign, indorse, or accept bills and notes for his principal, and he is discharged, if the discharge is not known by persons dealing with him, notes and bills subsequently signed, indorsed, or accepted by the clerk or agent, will be binding on the principal. Indeed, this is but another application of the known maxim of law and equity, that where one of two innocent persons must suffer, he shall suffer who, by his confidence or silence, or conduct, has misled the other.' Story on Agency, § 470.

"In the extract given, Mr. Story fully approves the doctrine held in the case of Anon. *v.* Harrison, 12 Mod., and also that of Burd *v.* Kirk, 11 N. H. 397, in which it was held, where an agency, constituted by writing, is revoked, but the written authority is left in the hands of the agent, and he exhibits it to a third person, who, on the faith of it, and without notice of the revocation, deals with him as an agent, within the scope of its authority, the principal is bound thereby. Indeed, I apprehend, upon this point there is no difference between the views entertained by Mr. Kent and Mr. Story. In his Commentaries, vol. ii. p. 645, Mr. Kent, after affirming the rule of the common law and the civil law to be the same, uses the following language upon the subject of the revocation of the power of the agent by the principal: 'Even if the notice had reached the agent, and he concealed the knowledge of the revocation from the public, and the circumstances attending the revocation were such that the public had no just ground to presume a revocation, his acts done under his former power, would still be binding upon his principal.'

"It thus appears evident from the authorities, that the actual revocation of

[1] Ante, §§ 36, 294, 315.

he purchases supplies, gives bottomry bonds, makes charter-parties, and sells the ship, in cases of necessity, in his own name; and these

the powers of the agent by the principal, does not, in *all* cases, terminate his authority. In precisely such a case as the one under consideration, if the revocation of the powers of the agent had been actually made by the principal in his lifetime, and he had proceeded to make sale as he did by virtue of the letter which he still held and exhibited, all would agree in pronouncing the acts of the agent binding, and the sale valid.

"But by what reasoning from analogies, or otherwise, can it be shown to be material in the case, whether the revocation of the powers of the agent be *actually made by the principal*, or whether the revocation be by *operation of law* merely?

"In the former case the revocation is intentional, and actually made by the principal; in the latter it is only accidental, and to be inferred from a given state of facts, and without the expressed will, and perhaps even against the will, of the principal. There is, then, no apparent reason why a revocation of an agency, by operation of law, by coverture, bankruptcy, lunacy, or death, should at all exclude the limitation or exception to the rule in such a case as the present. The substantive fact, that the agent has ceased to have authority to represent his principal, obtains equally in either case. And yet, paradoxical as it may seem, it is evident, from the authorities, that the agent may, under certain circumstances, continue to represent and bind the interests of his former principal after the actual revocation of his authority.

"Now upon what principle does the obligation, imposed by the acts of the agent after his authority has terminated, really rest? It seems to me the true answer is, public policy. The great and practical purposes and interests of trade and commerce, and the imperious necessity of confidence in the social and commercial relations of men, require that an agency, when constituted, should continue to be duly accredited. To secure this confidence, and consequent facility and aid to the purposes and interests of commerce, it is admitted that an agency, in cases of *actual* revocation, is still to be regarded as continuing, in such cases as the present, toward third persons, until actual or implied notice of the revocation. And I admit, that I can perceive no reason why the rule should be held differently in cases of revocation by mere operation of law.

"It seems to me that, in all such cases, where the party has, by his own conduct, purposely invited confidence and credit to be reposed in another as his agent, and has thereby induced another to deal with him in good faith, as such agent, neither such party nor his representatives ought to be permitted, in law, to gainsay the commission of credit and confidence so given to him by the principal. And I think the authorities go to that extent. (See Pickard *v.* Sears, 6 Adolph. & Ellis, 475.) The extensive relations of commerce are often remote as well as intimate. The application of this doctrine must include factors, foreign as well as domestic, commission merchants, consignees and supercargoes, and other agents remote from their principal; and who are required, for long periods of time not unfrequently, by their principal to transact business of immense importance, without a possibility of knowing perhaps even the probable continuance of the life of the principal. It must not unfrequently happen that valuable cargoes are sold and purchased in foreign countries by the agent, in obedience to his instructions from his principal, after and without knowledge of his death. And so, too, cases are constantly occurring of money being

acts are constantly treated, when within the scope of his ordinary duties and employment, as binding upon his owner.[1] Now, in all

collected and paid by agents, under instructions of the principal, after and without knowledge of his death. In all these cases, there is certainly every reason for holding valid and binding the acts so done by the agency which the principal had, in his life, constituted and ordered, that there would be to hold valid the acts of one who had ceased to be his agent, by revocation of his power, but without notice to the one trusting him as agent.

"But I have said, that I think the weight of authorities are in favor of the limitation, or exception, to the rule insisted upon; and I will here briefly state the authorities relied upon in support of the proposition.

"It may be observed, in the first place, that the doctrine, as expressed and illustrated by Littleton and by Coke, is not inconsistent with the limitation of the rule. In the case of Shipman *v.* Thompson, Will. 105, Mr. B. Fortescue, in giving judgment, speaking of money collected of tenants of the principal *after* his death, by an attorney appointed by him in his lifetime, remarked as follows: 'The original debtors, the tenants, are discharged;' intimating thereby that he regarded the payment by the tenants to the attorney of the principal, *after* his death, as payment to the representative of the principal. In the case of Knowles *v.* Luce, Moor, 112, Justice Manwood held, that, where the under-steward, *not knowing* the death of the head steward, had assembled the tenants and they rendered service under him, although he had no authority in fact *after* the death of the head steward, his death not being known, it was such *color* of authority, on the part of the under-steward, as to make obligatory his acts of receiving the service.

"And the same doctrine is clearly recognized by Lord Ellenborough, in the case of The King *v.* Bedford Level, 6 East, 356. In the case of McDonald *v.* McDonald, Buck, 399, cited to Justice Bailey in the trial of the case of Blades *v.* Free, 9 B. & Cressw. 167, it was said, and not disputed, that the Vice-Chancellor referred to a case tried by Lord Mansfield, in which he held, that acts done under a power of attorney in India after the *death of the principal, but in ignorance of the fact, were to be held binding* upon his representatives. In Russel on Crimes, 317, it is said: 'Again, the death of the principal will operate as a revocation of the authority,' &c. 'But where the factor or broker has authority to do an act in his own name, then it would seem that the death of the principal will not, *ipso facto*, determine such authority.' In Chitty on Com. & Manuf. 233, the law is said to be, that the acts of a legal agent may be good, done after the death of his principal, before notice thereof to those who are interested in his acts, as being done under a color of authority which strangers could not examine. In Chitty on Contr. 19, is the following language: 'And it is said that a sale or purchase by an agent, even after the death of his principal, if made without notice of the fact, will bind the representatives of the latter.' In the case of Davis *v.* Lane, 10 N. H. 156, it was held that the authority of the agent when revocable by the principal, was suspended or revoked by his lunacy, in consequence of an entire loss of mental power. But held *also*, that if the principal, by letter or otherwise, had enabled the agent to hold himself out as having authority, and the incapacity of the principal is not known to those dealing with the agent, within the scope of his apparent author-

[1] Ante, §§ 86, 116–123, 294–300, 315.

these cases of factors (and especially if they are foreign factors) and supercargoes and masters of ships, cases must constantly have arisen

ity, the principal and those claiming under him are precluded from setting up the insanity as a revocation.

"At the September term of the Supreme Court of Pennsylvania, in 1842, the question under consideration first came before that court, in the case of Cassiday *v.* M'Kinzie, 4 Watts & Serg. 282. To sustain the plea of payment of a certain judgment against Peter Cassiday, entered April 4, 1837, in favor of Eli M'Kinzie, the executors of Cassiday offered in evidence the following order: —

"'Mr. Peter Casidy please pay to the bearer Robert Burgoon whatever sum of money the court should make to me as I am not able to come up to court to git it myself and I dont wish you to pay it to John M'Kinsey and the receipt of Robert Burgoon shall be good to you for the same.

"'ELY M'KINZEE.

"'N. B. Pay the money to no person but Robert Burgoon.'

"The defendant below then called Robert Burgoon as a witness, to prove a number of receipts given by him for money upon the order, and the payment of the money as thereby expressed. The receipts were respectively dated Sept. 29, 1838; Jan. 11, 1839; April 15, 1839; June 12, 1839; Nov. 8, 1839; and Nov. 15, 1839. The receipts were admitted to be genuine, but objected to on the ground that the payments to Burgoon were not binding on the plaintiff, who was appointed administrator of M'Kenzie, June 21, 1839. The defendant also offered to prove, that the intestate went to the western country soon after giving the order to Burgoon; and that the money was paid to Burgoon without any knowledge of the death of M'Kenzie. The court excluded the evidence and sealed a bill of exceptions.

"The plaintiff in error, before the Supreme Court, insisted that the money paid to Burgoon by Cassiday, before knowledge of the death of M'Kenzie, was a valid payment. It was urged by the defendant in error, that the death of the principal, M'Kenzie, was a revocation of the power of the agent, Burgoon, and therefore the payments to Burgoon were void.

"The Supreme Court was unanimous in the opinion, that the acts of the agent, done after the death of the principal and without knowledge of his death, were binding upon the parties. Rogers, J., in delivering the opinion of the court, uses the following language: 'This money has been paid by the debtor in good faith, and received by the agent in good faith; and why should it not be good when the authority is revoked by death, as it confessedly is when expressly revoked by the principal in his lifetime? . . . Can it be that a payment made to an agent from a foreign country, and from one of our cities to the Western states, employed for the special purpose of collecting debts, is void because his principal may have died the very day before the actual receipt of the money? . . . It would be unjust to the agent, and unjust to the debtor.'

"In the case of Dick, Ex'r of Doughty *v.* Page & Bacon, 17 Mo. 234, the same question came before the Supreme Court of Missouri, at its October term, 1852. The holding of that court was the same as in Pennsylvania. The court were unanimous in the opinion that the rule, that the act of an agent done after the death of the principal without notice is void, *only applies*

in which the principal has died during the agency, or during the voyage and adventure; and yet transfers and sales have as constantly

to those acts which must be done *in the name* of the principal, and not to those acts which the agent may do in his own name.

"But the case under consideration is not one in which the acts of the agent could only be executed in the *name* of the principal. The agent La Ferry was not an agent to convey the title to the land; but only to negotiate a bargain with some one in relation to the conveyance. The instructions given by the principal to sell were as follows: 'I would be very glad, James, if you would sell my land. I am anxious to sell: do try to sell if you can, and I will satisfy you for it. I want you to do the best you can for me, for I am poor and needy.' Under the authority thus given, La Ferry might have made a verbal contract, upon exhibiting the letter, and have given possession and received part payment.

"There is no more necessity for the contract of sale, in this case, to have been made *in the name* of the principal than there would have been for the agent to have made a contract for the sale of a horse, or any other article of personal property, in the name of the principal. The act of delivering the horse, in the one case, and giving possession of the land in the other, and receiving all or part of the purchase-money, and promising a good title on full payment, would, in either case, be a valid execution of such agency. Thus, in the case of Bowen *v.* Morris, 2 Taunt. 374, 387, where, on a sale of real property by the corporation of Caermarthen, at public auction, May 14, 1804, David Bowen had become the purchaser, and the same was witnessed by a memorandum in writing of the tenor following: 'The above-mentioned premises comprised in lot 35, were this day sold to David Bowen (the defendant below) for £1,000, subject to the conditions of the sale within mentioned, and David Bowen, the purchaser or highest bidder of the said lot, and Thomas Morris, Esq., the mayor of the said corporation, on behalf of himself and the rest of the burgesses and commonalty of the borough of *Caermarthen*, the vendors of the premises, do hereby mutually agree to perform and fulfil, on each of their parts respectively, the within conditions of sale. Signed, T. Morris, Mayor. David Bowen.'

"And which contract of the mayor afterwards, on the 22d of June, 1804, was approved by resolution, and order duly made and entered at a corporate meeting of the borough, held in pursuance of their charter. After being twice argued at great length it was unanimously held by the court, Mansfield, C. J., giving the opinion, that the contract was 'on behalf of the corporation.' The mayor, says the court, 'did not contract on behalf of himself personally, but on behalf of the corporation; that he acted merely as an agent.'

"The letter to La Ferry, it is to be remarked, was not a power of attorney, or intended to authorize him to *convey* the lands, only to make a contract of sale, a bargain. So when A., an agent duly authorized, wrote on a note, 'by authority from B., I hereby guaranty the payment of this note,' and signed in his own name, A., it was held to be the guaranty of the principal, and not of the agent. N. E. Mar. Ins. Co. *v.* De Wolf, 8 Pick. 56.

"Although the rule is somewhat strict in relation to the mode of executing sealed instruments by an agent, where, from the objects of the instrument, it is essential they should be in the name and under the seal of the principal in order to give legal operation to the same; yet the rule is less strict, and, indeed, receives a liberal exposition in all contracts not under seal made by

been made, when the death of the principal must have been unknown. No case has as yet been decided, that, at the common law, the power was not lawfully exercised after the death of the principal under such circumstances. On the contrary, the general understanding seems to be that the acts done by the factor, supercargo, and master, are, under such circumstances, binding upon all the parties in interest. These cases seem, in truth, to be disposed of by the single consideration, that they either are, in fact, cases of powers coupled with an interest, or are governed by the like analogy.

§ 497. The same doctrine seems to be understood to apply to cases of policies of insurance, procured by insurance brokers in their own names, but for and on behalf of their principals, whose right to receive the moneys for losses upon such policies, after the death of their principals, is admitted, without any distinction, whether the death be known or unknown. Being parties to the contract, they are treated, as to the underwriters, as principals, for the purpose of receiving such losses.[1] And, if an insurance broker were authorized to procure a policy of insurance, and should execute his orders, but before the execution thereof the principal should, unknown to him, die, it would certainly deserve consideration, whether, in such case, the policy would be utterly void by the supposed revocation of the order by operation of law.

the agent. 'In such cases,' says Mr. Story, 'in furtherance of public policy of encouraging trade, if it can, upon the whole instrument, be collected that the true object and intent of it are to bind the principal, and not the agent, courts of justice will adopt that construction of it, however informally it may be expressed.' The same doctrine is laid down by the Supreme Court of the United States in the case of Mechanics' Bank of Alexandria *v.* Bank of Columbia, 5 Wheat. 326; also by the Supreme Court of New York, in the cases of Pentz *v.* Stanton, 10 Wend. 271, and Townsend *v.* Hubbard, 4 Hill, 351.

"The contract under consideration would fall under this liberal exposition, and would have been obligatory upon the principal, if he had survived, even though his name were not subscribed to the contract. It would have been sufficient that it appeared on the face of the contract that it was made for him by the agent.

"If, then, any contract, made by an agent after the death of his principal, without knowledge of the event, in law can, and in equity ought, to be held binding, this is such a contract.

"I believe the weight of authority is in favor of the rule being the same at common law as in the civil law, in regard to acts thus done after the death of the principal. But if doubtful, or even if the weight of authorities were against the exception existing at common law, in favor of the binding character of the acts of the agent, the reason in favor of the exception is unanswerable." — R.]

[1] Ante, §§ 161, 272, 394.

§ 498. Whether, therefore, our law be so strict and rigid in its character, as to the implied revocation, resulting from the death of the principal, in cases where the agency can be, nay, ordinarily is and should be, executed in the name of the agent, and not of the principal (as has been often supposed), is a point which may perhaps be entitled to further consideration and examination than it has been thought hitherto to require.[1] If it be thus strict and rigid, it certainly must involve very many practical inconveniences and embarrassments, without obtaining any clear assignable good to the community at large. But, upon such a subject, it is the duty of the commentator to abstain from any further reflections.[2]

§ 499. Sixthly. As to the dissolution or determination of agency by the extinction of the subject-matter of the agency, or of the principal's power over it, or by the complete execution of the trust confided to the agent.[3] Neither of these cases can require any illustration to make them more clear or intelligible. The dissolution results from the very nature of the agency. If the subject-matter of the agency has become extinct, — as, if the principal authorizes his agent to sell a particular ship, of which he is the owner, and the ship is afterwards lost, sunk, or destroyed, — it is manifest, that there is a physical impossibility of doing the act. If the owner has sold the ship to another person, before any sale by the agent, there then arises an implied revocation of the authority.[4] If the agent, in pursuance of his authority, makes a complete sale of the ship, the agency is *functus officio*, and therefore has its natural termination.[5] So, if in any other manner the principal's power over the subject-matter becomes extinct, the agency over it also ceases. Thus, a guardian

[1] [See Dick *v.* Page, 17 Mo. 234.]

[2] As to how far a revocation of authority by the death of the principal, unknown to both parties, will affect the agent with liability for goods purchased for the principal, see Smout *v.* Ilberry, 10 Mees. & Wels. 1; Ante, § 465 *a*.

[3] Story on Bailm. § 207; Pothier, de Mandat, n. 112.

[4] Story on Bailm. § 207.

[5] Seton *v.* Slade, 7 Ves. 276. [The power of constituting an agent is founded upon the right of the principal to do the business himself. So, where the principal has parted with his right in the subject-matter of the agency before the agent has exercised the power, that act is *per se* a revocation in law of the power conferred upon the agent. Gilbert *v.* Holmes, 64 Ill. 548. So, where an agent was employed to purchase lands, it was held that his agency ended with the delivery of the papers and the final transfer of the money, Moore *v.* Stone, 40 Iowa, 259: he has then no authority to rescind such contract, Bradford *v.* Bush, 10 Ala. 386; Smith *v.* Rice, 1 Bailey, 648. — Ed.]

ceases to have any power over his ward's property, when the latter comes of age; and, therefore, the guardian cannot authorize any further act to be done respecting it.[1]

§ 500. Here these commentaries upon the law of agency are brought to their natural close. Upon reviewing the whole subject, it cannot escape the observation of the diligent reader, how many of the general principles which regulate it are common to the Roman law, to the law of continental Europe and Scotland, and to the commercial jurisprudence of England. To the latter, however, we are indebted, not only for the fullest and most comprehensive exposition of these principles, but for the most varied and admirable adaptations of them to the daily business of human life. It is indeed to be numbered among the proudest achievements of England, that, while the peculiar doctrines of her own common law have been cultivated and illustrated by her lawyers, and administered by her judges, with a sagacity and learning and ability rarely equalled and never excelled, Westminster Hall has promulgated the more enlarged and liberal principles of her commercial jurisprudence with a practical wisdom and enlightened policy which have commanded the respect of the world, and silently obtained for it an authority and influence more enviable and more extensive even than those acquired by her arts or her arms.

[1] Story on Bailm. § 207; Pothier, de Mandat, n. 112; Ante, § 484.

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